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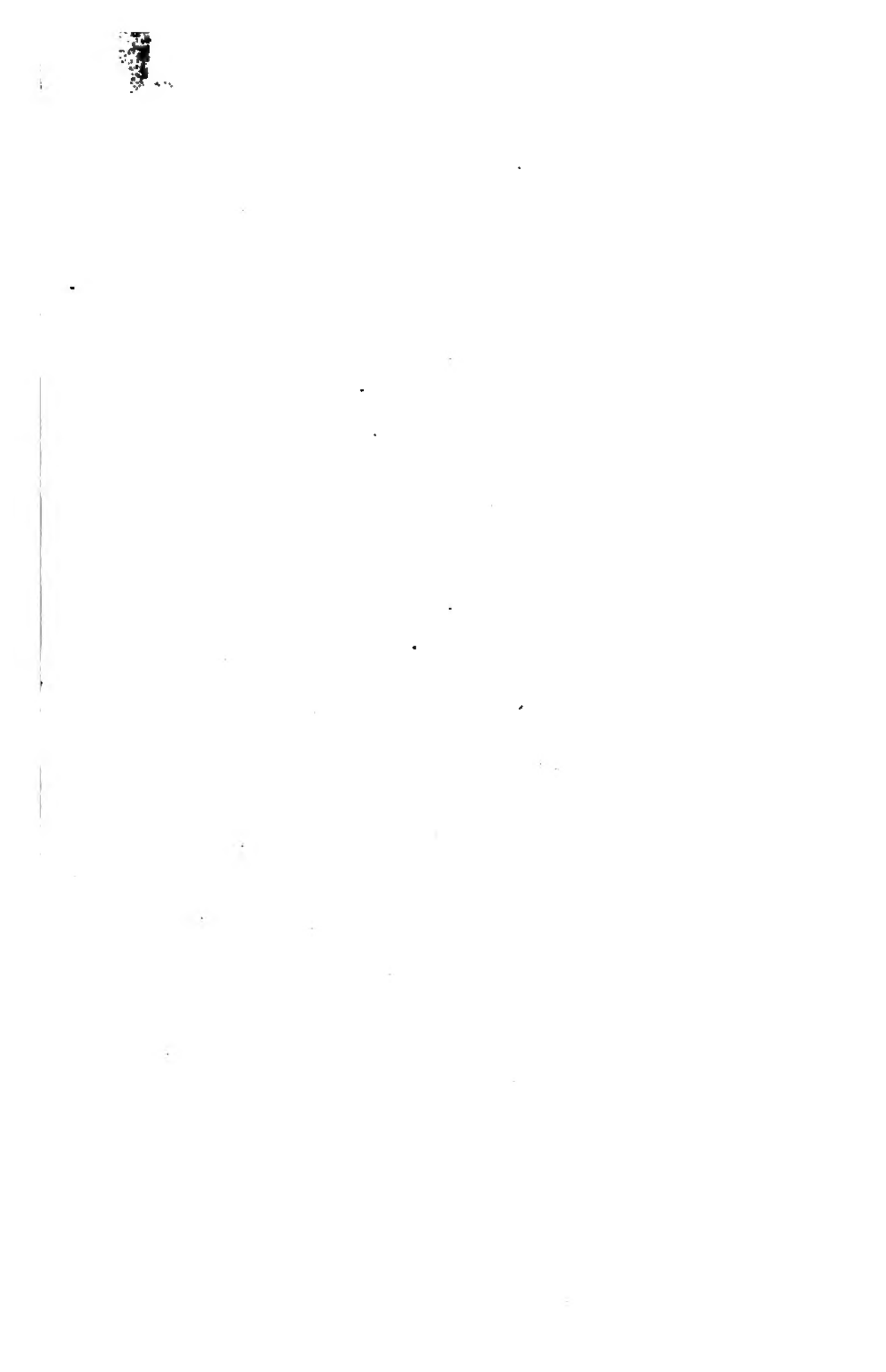




















# THE AMERICAN LAW TIMES REPORTS.

A COLLECTION OF

LEADING CASES DECIDED IN THE COURTS OF THE  
UNITED STATES, AND COURTS OF LAST  
RESORT OF THE SEVERAL  
STATES.

TOGETHER WITH

A DIGEST OF CASES OF VALUE REPORTED IN AMERICAN  
LEGAL PERIODICALS DURING THE YEAR 1876.

EDITED BY  
ROWLAND COX.

*"It is impossible but in process of time, as well from the nature of things changing, as corruption of agents, abuses will grow up: for which reason, the law must be kept as a garden, with frequent digging, weeding, turning, &c. That which in one age was convenient, and perhaps necessary, in another becomes an intolerable nuisance." — ROGER NORTH.*

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# TABLE OF CASES.

	PAGE		PAGE
Adden v. White Mt. N. H. R. R. Co. . . . .	78	Eaves (Town of Coloma v.) . . .	235
Ambrose v. Woodmansee . . .	445	Exch. Bank of Pittsburg (Smith v.) . . . . .	427
Angle v. N. W. Life Ins. Co. . .	398	Faber (Reckendorfer v.) . . .	304
Ansonia Co. (New Lamp Chim- ney Co. v.) . . . . .	110	First Nat'l Bank of Carlisle v. Graham . . . . .	501
Atlanta, &c. R. R. Co. (Wilmer v.) . . . . .	29	First Nat'l Bank of Chetopa (Crocker v.) . . . . .	350
Ballou v. Prescott . . . . .	53	Foster, <i>in re</i> . . . . .	411
Balto. & P. R. R. Co. v. Reany .	204	Ft. Wayne, &c. R. R. Co. (Gilder- sleeve v.) . . . . .	118
Boyd v. Watt . . . . .	524	Fuentes (Gaines v.) . . . . .	361
Bracken v. Johnston . . . . .	537	Gaines v. Fuentes . . . . .	361
Bradbury (Collins v.) . . . . .	67	Gildersleeve v. Ft. Wayne &c. R. R. Co. . . . .	118
Campbell v. Thomas . . . . .	49	Graham (First Nat'l Bank v.) . .	501
Chandler v. Coe . . . . .	291	Grand Tr. R. W. Co. v. Richard- son . . . . .	166
Ches. & O. R. R. Co. (Duncan v.)	194	Grove v. Todd . . . . .	59
Chicago, &c. R. W. Co. (McKin- ley v.) . . . . .	279	Hall v. Lanning . . . . .	105
Citizens' Ins. Co. (West v.) . .	353	Hardy v. Merrill . . . . .	374
Citizens' National Bank v. Smith.	248	Henderson v. Wickham, Mayor .	227
City of Bangor (City of Portland v.) . . . . .	435	Henkelman v. Smith . . . . .	283
City of Portland v. City of Bangor	435	Hibernia Sav. Institution (Peo- ple v.) . . . . .	241
City of Richmond (West. Un. Tel. Co. v.) . . . . .	148	Hill v. Inhabitants of Seekonk .	301
Clarke (Pentz v.) . . . . .	4	Hobson v. Lord . . . . .	257
Coe (Chandler v.) . . . . .	291	Humboldt Township v. Long . .	330
Collins v. Bradbury . . . . .	67	Huxford (Sanford v.) . . . . .	23
Com. of Emigration v. No. Ger- man Lloyd . . . . .	227	Inhabitants of Seekonk (Hill v.) . . . . .	301
Cooper (Marshall v.) . . . . .	514	Jessup (Miller v.) . . . . .	266
Cramer v. Lepper . . . . .	332	Johnson's Ex. (Riddell v.) . .	171
Crocker v. First National Bank of Chetopa . . . . .	350	Johnston (Bracken v.) . . . .	537
Cruikshank (United States v.) .	206	Jones (Sewall v.) . . . . .	120
Curtis (Kellogg v.) . . . . .	419	Kellogg v. Curtis . . . . .	419
Downey (Pryor v.) . . . . .	68	Kidder (Lieb v.) . . . . .	266
Doyle (State v.) . . . . .	450	Kimball (Sanborn v.) . . . . .	13
Duncan v. C. & O. R. R. Co. . .	194		
Dunn v. Rankin & Co. . . . .	436		
Dwight (Snell v.) . . . . .	560		

	PAGE		PAGE
King (Wilmington & W. R. R. Co. v.) . . . . .	1	Richardson (Grand Tr. R. W. Co. v.) . . . . .	166
Knickerbocker Life Ins. Co. (Thompson v.) . . . . .	370	Riddell v. Johnson's Ex'r . . . . .	171
Lane (Roberts v.) . . . . .	189	Roberts v. Lane . . . . .	189
Lang (Sanborn v.) . . . . .	84	Rogers (State of Nevada v.) . . . . .	339
Lanning (Hall v.) . . . . .	105	Roman v. Mali . . . . .	312
Lepper (Cramer v.) . . . . .	332	Rowe v. Portsmouth . . . . .	482
Lewis (Penna. R. R. Co. v.) . . . . .	490	Sanborn v. Kimball . . . . .	13
Lieb v. Kidder . . . . .	266	—— v. Lang . . . . .	84
Locke v. McVean . . . . .	422	Sanford v. Huxford . . . . .	23
Long (Humboldt Town v.) . . . . .	330	Secor (Taylor v.) . . . . .	266
Lord (Hobson v.) . . . . .	257	Sewall v. Jones . . . . .	120
Lynch (People v.) . . . . .	127	Smith (Citizens Nat'l Bank v.) . . . . .	248
Macumber v. Nichols . . . . .	345	—— v. Ex. Bank of Pittsburg . . . . .	428
Mali (Roman v.) . . . . .	312	—— (Henkelman v.) . . . . .	283
Marcy v. Town of Oswego . . . . .	295	Smith, <i>in re</i> . . . . .	335
Marshall v. Cooper . . . . .	514	Snell v. Dwight . . . . .	560
Marts v. The State . . . . .	414	State v. Doyle . . . . .	450
McKinley v. Chicago, &c. R. R. Co. . . . .	279	—— (Marts v.) . . . . .	414
McVean (Locke v.) . . . . .	422	State of Missouri, (Welton v.) . . . . .	100
Merrill (Hardy v.) . . . . .	374	State of Nevada v. Rogers . . . . .	339
Miller v. Jessup . . . . .	266	Taylor v. Secor . . . . .	266
New Lamp Chimney Co. v. Ansonia Co. . . . .	110	Thomas (Campbell v.) . . . . .	49
Nichols (Macumber v.) . . . . .	345	Thompson v. Knickerbocker Life Ins. Co. . . . .	370
North German Lloyd (Com. of Emigration v.) . . . . .	227	Todd (Grove v.) . . . . .	59
N. W. Life Ins. Co. (Angle v.) . . . . .	398	Town of Coloma v. Eaves . . . . .	235
Oregon, &c. Printing Co., <i>in re</i> . . . . .	469	Town of Oswego (Marcy v.) . . . . .	295
Penna. R. R. Co. v. Lewis . . . . .	490	United States v. Cruikshank . . . . .	206
Pentz v. Clarke . . . . .	4	—— v. Reese . . . . .	201
People v. Hib. Savings Institution . . . . .	241	Watt (Boyd v.) . . . . .	524
—— v. Lynch . . . . .	127	Welton v. State of Missouri . . . . .	100
Portsmouth (Rowe v.) . . . . .	482	West v. Citizens' Ins. Co. . . . .	353
Prescott (Ballou v.) . . . . .	53	Westerman v. Westerman . . . . .	142
Pryor v. Downey . . . . .	68	West. Un. Tel. Co. v. City of Richmond . . . . .	148
Railroad Co. (Young v.) . . . . .	91	White Mt. N. H. R. R. Co. (Ad-den v.) . . . . .	78
Rankin & Co. (Dunn v.) . . . . .	436	Wickham, Mayor (Henderson v.) . . . . .	227
Reany (B. & P. R. R. Co. v.) . . . . .	204	Wilmer v. A. & R. Air Line R. R. Co. . . . .	29
Reckendorfer v. Faber . . . . .	304	Wilmington & Weldon R. R. Co. v. King . . . . .	1
Reese (United States v.) . . . . .	201	Woodmansee (Ambrose v.) . . . . .	445
		Young v. The R. R. Co. . . . .	91

THE  
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OF FINAL APPEAL OF ALL THE STATES.

NEW SERIES. — JANUARY, 1876. — VOL. III., No. 1.

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**SUPREME COURT OF THE UNITED STATES.**

[OCTOBER TERM, 1875.]

CONTRACTS BETWEEN CITIZENS OF CONFEDERATE STATES PAYABLE IN  
CONFEDERATE MONEY. — EVIDENCE. — OBLIGATION OF CONTRACTS.

**WILMINGTON AND WELDON RAILROAD CO. v. KING.**

Contracts made during the war in one of the Confederate States, payable in Confederate currency, but not designed in their origin to aid the insurrectionary government, are not, because thus payable, invalid between the parties.

In actions upon such contracts evidence as to the value of that currency at the time and in the locality where the contracts were made is admissible.

A statute of North Carolina of March, 1866, enacting that in all civil actions "for debts contracted during the late war, in which the nature of the obligation is not set forth, nor the value of the property for which such debts were created is stated, it shall be admissible for either party to show on the trial, by affidavit or otherwise, what was the consideration of the contract; and that the jury in making up their verdict shall take the same into consideration, and determine the value of said contract in present currency, in the particular locality in which it is to be performed, and render their verdict accordingly," in so far as the same authorizes the jury in such actions upon the evidence thus before them to place their own estimate upon the value of the contracts, instead of taking the value stipulated by the parties, impairs the obligation of such contracts and is, therefore, within the inhibition upon the state of the federal Constitution. Accordingly, in an action upon a contract for wood sold in that state during the war, at a price payable in Confederate currency, an instruction of the court to the jury that the plaintiff was entitled to recover the value of the wood without reference to the value of the currency stipulated was erroneous.

IN error to the supreme court of the State of North Carolina.

Mr. Justice FIELD delivered the opinion of the court.

The contract between the defendant and the plaintiff's testatrix, upon which the present action was brought, was made in North Carolina dur-

ing the war. By its terms the wood purchased by the railroad company was to be paid for in Confederate currency. Contracts thus payable, not designed in their origin to aid the insurrectionary government, are not invalid between the parties. It was so held in the first case in which the question of the validity of such contracts was presented, that of *Thorington v. Smith*, 8 Wallace, 1, and the doctrine of that case has been since affirmed in repeated instances. The treasury notes of the Confederate government, at an early period in the war, in a great measure superseded coin within the insurgent states, and, though not made a legal tender, constituted the principal currency in which the operations of business were there conducted. Great injustice would, therefore, have followed any other decision invalidating transactions otherwise free from objection, because of the reference of the parties to those notes as measures of value. *Hanauer v. Woodruff*, 15 Wallace, 448, and *Confederate Note Case*, 19 Ib. 556.

But as those notes were issued in large quantities to meet the increasing demands of the Confederacy, and as the probability of their ultimate redemption became constantly less as the war progressed, they necessarily depreciated in value from month to month, until in some portions of the Confederacy, during the year 1864, the purchasing power of from twenty-one to upwards of forty dollars of the notes only equalled that of one dollar in lawful money of the United States. When the war ended, the notes, of course, became worthless and ceased to be current, but contracts made upon their purchasable quality existed in large numbers throughout the insurgent states. It was, therefore, manifest that if these contracts were to be enforced with anything like justice to the parties, evidence must be received as to the value of the notes at the time and in the locality where the contracts were made; and in the principal case cited such evidence was held admissible. Indeed, in no other mode could the contracts as made by the parties be enforced. To have allowed any different rule in estimating the value of the contracts and ascertaining damages for their breach, would have been to sanction a plain departure from the stipulations of the parties, and to make for them new and different contracts.

In the case at bar the state court of North Carolina declined to follow the rule announced by this court, and refused to instruct the jury that the plaintiff was entitled to recover only the value of the currency stipulated for the wood sold, and instructed them that he was entitled to recover the value of the wood without reference to the value of that currency. This was nothing less than instructing them that they might put a different value upon the property purchased from that placed by the parties at the time. In this ruling the court obeyed a statute of the state, passed in March, 1866, which enacted "that in all civil actions which may arise in courts of justice for debts contracted during the late war, in which the nature of the obligation is not set forth, nor the value of the property for which such debts were created is stated, it shall be admissible for either party to show on the trial, by affidavit or otherwise, what was the consideration of the contract; and the jury in making up their verdict shall take the same into consideration, and determine the value of said contract in present currency, in the particular locality in which it is to be performed, and render their verdict accordingly."



This statute, as construed by the court, allowed the jury to place their own judgment upon the value of the contract in suit, and did not require them to take the value stipulated by the parties. A provision of law of that character, by constituting the jury a revisory body over the indiscretions and bad judgments of contracting parties, might in many instances relieve them from hard bargains, though honestly made upon an erroneous estimate of the value of the articles purchased, but would create an insecurity in business transactions which would be intolerable. It is sufficient, however, to say that the Constitution of the United States interposes an impassable barrier to such new innovation in the administration of justice, and with its conservative energy still requires contracts, not illegal in their character, to be enforced as made by the parties, even against any state interference with their terms.

The extreme depreciation of Confederate currency at the time the wood, which is the cause of the suit, was purchased, gives a seeming injustice to the result obtained. But until we are made acquainted with all the circumstances attending the transaction, we cannot affirm anything on this point. The answer alleges that the wood was to be cut by the defendant's hands, and that the plaintiff's testatrix was only to furnish the trees standing. It may be that under such circumstances the cost of felling the trees and removing the wood was nearly equal to the value of the wood by the cord as found by the jury, which was fifty cents. Be that as it may, it is not for the court to give another value to the contract than that stipulated by the parties, nor is it within the legislative competence of a state to authorize any such proceeding.

The judgment of the supreme court of North Carolina must be reversed, and the cause remanded for further proceedings.

Mr. Justice BRADLEY, dissenting. I dissent from the judgment of the court in this case. The parties never contracted that the price to be paid for the wood was to be equivalent to any amount of specie. The price contracted for was one dollar per cord. Specie at that time was worth twenty-one dollars to one of Confederate currency. Can it be supposed that the parties agreed on a value of five cents per cord for the wood? The suggestion does not appear to me to be reasonable. The truth is, that the relation between Confederate currency and specie in North Carolina at that time is entirely unsuitable to be used as a rule in estimating the value of contracts. Specie could not be had at all, and consequently the relation between currency and specie was no guide as to the value of currency in purchasing commodities. The verdict finds that the wood, at the time of the contract, was worth fifty cents in specie per cord, and yet it sold for a dollar in currency. This shows that currency was equivalent to fifty cents on the dollar in purchasing capacity. I hold, therefore, that the law of North Carolina, in allowing the jury to estimate the real value of the consideration, in cases where it is impossible to get at the true value of the money named in the contract, is a most sensible and just law.

By what authority do we scale down the price named in the contract at all? Is it not on the ground that the value of the money named by the parties is not a true criterion of the value of the contract? When once we admit this we make that money a mere commodity, and en-

deavor to find its true value. How, then, is its true value to be measured? Is it to be measured only by the amount of specie it would purchase at the time, when, perhaps, no specie existed in the country? Why not measure its value by the amount of United States treasury notes which it would buy? They were money, as well as specie. But suppose they were not to be had in the market any more than specie. Under such circumstances is not the only true method of ascertaining its value the purchasing capacity which it had? I hold that this is the true test, when, as stated by the Legislature of North Carolina in its preamble to the act, it is impossible to scale the value of Confederate money accurately for all parts of the state under the varying circumstances that arose. Under such circumstances, the only fair mode of ascertaining the purchasing value of the currency used is to ascertain the true value of the consideration or thing purchased. This is not to set aside the contract of the parties, but to carry out their contract. It is the proper method of ascertaining what their contract really meant, and giving it full force and effect.

Where a regular current ratio exists between a paper currency and specie or other lawful money, of course it ought to be used as the rule to ascertain the true value of contracts. But when no such regular marketable value does exist, then the next best mode of getting at the value of the contract, or of the currency mentioned therein, is to ascertain the true value of the subject matter about which the contract was made. This is what the Legislature of North Carolina authorized to be done, and what was done in this case.

I think the judgment should be affirmed.

## COURT OF APPEALS OF MARYLAND.

(To appear in 41 Md.)

**REPAIRS IN HOME PORT. — AUTHORITY OF CAPTAIN TO PLEDGE OWNER'S CREDIT. — AUTHORITY OF PART OWNER TO PLEDGE CREDIT OF CO-OWNER. — HOW THE OWNER OF A VESSEL MAY BE MADE LIABLE FOR REPAIRS, BY ORDER OF CAPTAIN, IN HOME PORT.**

### PENTZ v. CLARKE.

The captain of a vessel, as such, has no authority to pledge the credit of the owner for necessary repairs made at the home port, where the owner resides and can be consulted, and can personally interfere.

And the fact that the captain is also a part owner of the vessel, gives him no authority to pledge the credit of his co-owner for such repairs. In order to bind the owner of a vessel for necessary repairs done at the home port, where he resides and can personally interfere, the master must have special authority for that purpose; or the owner must have held out the master as having such authority; or he must have ratified the contract after it was made.

APPEAL from the superior court of Baltimore city.

The nature of the case is stated in the opinion of the court. The steamer *Massachusetts* was purchased in New York for \$20,000, from A. J. Richardson by Samuel J. Pentz, and it was conveyed to him and his brother, the appellant, by bill of sale dated 7th of February, 1868, and recorded at the Baltimore Custom-house on the 21st of March, 1868. On the 24th of June, 1867, Samuel J. Pentz and the appellant mortgaged said steamer to the Old Town Savings Institution of Baltimore to secure the sum of \$20,000 loaned to Samuel. By bill of sale dated the 14th of May, 1868, and recorded the same day, Samuel J. Pentz conveyed his one half interest in the steamer to Joseph White. Previous to this, White was authorized by Samuel J. Pentz to take charge of the steamer. The steamer was repaired during the year 1868, in the city of Baltimore, the home port and the residence of the appellant, by the plaintiffs at the instance and request of White, who stated that he was master and part owner thereof, and that the appellant was the other part owner. White obtained no authority from the appellant to have the work done. The repairs were reasonable, and necessary for the running of the vessel, and were made upon the credit of the vessel and her owners, and were charged upon the books of the plaintiffs to "Steamer *Massachusetts* and owners." A part of the bill for repairs was paid by White. The appellant testified that he did not know that his name was on the register as part owner of the steamer, until some two or three years after the bill of sale from Richardson was recorded, she having been bought by Samuel J. Pentz, and that he never exercised any act of ownership over said vessel, except the execution of the mortgage aforesaid, which was executed by him at the instance and for the benefit of his brother Samuel, who got the entire amount of \$20,000 loaned by the bank; that he never took possession of said steamer, nor appointed, nor joined in the appointment of officers for her, nor run her or interfered with her running, nor received anything from her earnings; that Samuel J. Pentz asked his permission to let White take charge of the vessel as captain, but he refused; that his brother came a second time and said White could raise enough money to pay for necessary repairs and expenses, and that he (the appellant) would not be made responsible for a dollar; but he still refused; that he never passed a word with White about the vessel; the details for her management were arranged between White and his brother Samuel; that he was not a party to it; the vessel was entirely under the control of his brother Samuel and White, they having exclusive possession of her.

*Exception.* The plaintiffs offered the following prayers:—

1. If the jury believe from the evidence that J. W. D. Pentz and Joseph White were joint owners of the steamer *Massachusetts*, and that said White was master of said vessel, and as such part owner and master did order the plaintiffs to do the work and make the repairs charged for in the cause of action, and that such repairs and work were reasonably necessary for the outfit and proper management of said vessel, and were made by the plaintiffs, then their verdict must be for the plaintiffs, even though they find that said Pentz did not order said work and materials or expressly agree to become responsible for their payment.

2. If the jury believe from the evidence that J. W. D. Pentz was part owner of the steamer *Massachusetts*, and that Joseph White was the master of said vessel, and as such did order and contract with the plaintiffs to do the work and make the repairs on said vessel charged for in the cause of action, and that such repairs and work were reasonably necessary for the proper outfit and management of said vessel, and were made by the plaintiffs, then their verdict must be for the plaintiffs, even though they find that said Pentz did not order said work and materials or expressly agree to become responsible for their payment.

And the defendant offered the following prayers:—

1. That if the jury find from the evidence in the cause that the bill sued upon was contracted by the said Joseph White, without the knowledge, privity, or consent of John W. D. Pentz, and without his authority; that at the time of so doing the said White was the registered half owner of said boat; then plaintiffs are not entitled to recover, unless the jury further find from the evidence in the cause that said Pentz subsequently ratified the contracting of said debt by said White, and that there is no evidence in this cause from which the jury can find that said debt was contracted by the authority of said Pentz, and with his knowledge, privity, or consent, or that said Pentz subsequently ratified the same.

2. That if the jury find from the evidence in the cause that the debt sued upon by the plaintiffs was contracted by the said White, and at the time of contracting the same he was the master of said steamer, and that the debt so contracted by him was contracted without authority of said Pentz, and without his knowledge, privity, or consent, and was not subsequently ratified by said Pentz, then the plaintiffs are not entitled to recover, and that there is no evidence in this cause of such authority or subsequent ratification.

3. If the jury find the debt offered in evidence, and that it was contracted by Joseph White, and that he took possession of said steamer by authority of Samuel J. Pentz, and without any authority of John W. D. Pentz, and that the latter in no way directed or authorized said White to act as his master of said vessel, and that said White, in contracting said debt, did not contract as John W. D. Pentz's master of said steamer, and on a contract with said Pentz, on orders given by the said White as for said Pentz, then the plaintiffs cannot recover, and that there is no evidence in this cause that said White was the defendant's master, or that he contracted said debt as for said Pentz.

4. If the jury find the debt mentioned in plaintiffs' bill of particulars, and that it was contracted by Joseph White at the city of Baltimore, and that said vessel was registered at the port of Baltimore, and that said Pentz resided in the city of Baltimore at the time covered by said bill of particulars, and that said Pentz in nowise ordered or directed said repairs, then the plaintiffs are not entitled to recover, unless Pentz ratified subsequently the acts of said White, and that there is no evidence of such ratification.

5. If the jury shall find from the evidence that John W. D. Pentz never took possession of the steamer *Massachusetts*, and never exercised acts of ownership over her, except as to the mortgage, and the explanation thereof given by him, and that said Pentz never run, or authorized

the running of said steamer, or authorized White to repair said steamer, or appointed officers for her, then the plaintiffs are not entitled to recover, although the jury may find that White ordered said repairs for said steamer on behalf of the owners.

6. If the jury find that said steamer was taken possession of by said White, under authority from Samuel J. Pentz, and that said White acted as captain, by authority of himself and said S. J. Pentz, and that said White contracted the debt mentioned in evidence, and that before White took charge of said boat, J. W. D. Pentz refused to allow said vessel to be run under his authority, or so as to make him liable in any way whatever for account of said vessel, and refused to be responsible for one cent, on account of said vessel, then the plaintiffs cannot recover.

The court (Dobbin, J.) granted the plaintiffs' prayers and rejected those of the defendant. To this ruling of the court the defendant excepted, and the verdict and judgment being for the plaintiffs, he appealed.

The cause was argued before Miller, Alvey, and Robinson, JJ., by agreement of counsel, and Bartol, C. J., and Stewart, J., participated in its determination.

*William R. Reese & John Carson*, for the appellants. White, in ordering the repairs, acted in his relation or capacity as owner, and not as master. Being himself a half owner, his acts must necessarily be referred to his higher capacity as principal or owner, and not master. But for one owner to bind his co-owner for repairs made at the home port where his co-owner resides, there must be express authority from such co-owner, or a holding out amounting to such authority; no such authority results from the relation of co-ownership *per se*. The question is always one of agency, to be found by the jury. 1 Par. Mar. Law, 87; *Brodie v. Howard*, 84 Eng. Com. Law, 117; *Hackwood v. Lyall*, Ib. 124; *Myers v. Willis*, 86 Ib. 887; *Curling v. Robertson*, 49 Ib. 388; *Mitcheson v. Oliver*, 85 Ib. 444; *McCready v. Woodhull*, 84 Barbour, 80; *Milburn v. Guzyther*, 8 Gill, 92; *Elder v. Larrabee*, 45 Maine, 594; *Revens v. Lewis*, 2 Paine C. C. R. 202; *Stedman v. Feidler*, 25 Barb. 605; *Morgan v. Shinn*, 15 Wallace, 110; *Howard v. Odell*, 1 Allen, 85.

There is no evidence in the case that John W. D. Pentz ever gave White authority expressly to order these repairs, or held White out as possessing such authority; this disposes of the whole case.

Both the plaintiffs' prayers are erroneous and calculated to mislead the jury, because they base the plaintiffs' right to recover upon White's acts in his relation as master and not as owner. And even if it be held that the plaintiffs' first prayer submits to the jury the question of Pentz's liability by reason of White's acts being done in the capacity of part owner, it is erroneous and misled the jury, because they were not further instructed to find that Pentz had given express authority to White, or held him out as having such authority to bind him. As the prayer now stands, the jury were directed to find against Pentz, though they might believe that White was in nowise the agent of Pentz.

The plaintiffs' first prayer is further erroneous and calculated to mislead the jury, because it bases Pentz's liability upon White's relation as owner and master combined, which combination of relation to the vessel

has no legal significance in fixing Pentz's liability, though the jury may from the form of this prayer have inferred otherwise.

But suppose White's acts are not to be referred exclusively to his relation as owner, but also as master, what then? Does it follow that by his mere relation as master he was authorized to bind the general owners, irrespective of the questions how he was appointed, and by whom he was appointed, or the place where the repairs were done?

The plaintiffs' prayers, granted by the court below, assert the proposition that because White was master, and ordered repairs, therefore Pentz as general owner was responsible for them. This doctrine of the liability of general owner for the acts of the master, from his mere relation to the vessel as master, was long since repudiated by this court, and the law held otherwise. *Henderson v. Mayhew*, 2 Gill, 393; *Stirling & Ahrens v. Loud*, 33 Md. 436; *Stirling v. Navassa Phosphate Co.* 35 Md. 140.

Whatever may have been the law heretofore, the whole current of modern authority is to this point, — *whose agent is the party ordering the repairs?* The whole question is one of agency, and the law is now so held by the highest tribunals of this country and Great Britain. *Myers v. Willis*, 84 Eng. Com. Law, 103; *Same v. Same*, 86 Ib. 887; *Mitcheson v. Oliver*, 85 Ib. 444; *Bernard v. Aaron*, 103 Ib. 889; *Hibbs v. Ross*, 1 Queen's Bench, 534 (Law Reports); *The Troubadour*, 1 Ad. & E. Rep. 303 (Law Reports); *The Great Eastern*, 2 Ib. 88 (Law Reports); *Mackenzie v. Pooley*, 34 Eng. Law & Eq. 486; *Schooner Freeman v. Buckingham*, 18 Howard, 182; *Thomas v. Osborn*, 19 Ib. 22; *Morgan's Assignees v. Skinn*, 15 Wallace, 110; *Howard v. Odell*, 1 Allen, 85; *Blanchard v. Fearing*, 4 Allen, 118; *Webb v. Peirce*, 1 Curtis, 104; *Mayo v. Snow*, 2 Curtis, 102; *Macy v. Wheeler*, 30 N. Y. 241; *Revens v. Lewis*, 2 Paine C. C. R. 202; *Stedman v. Feidler*, 25 Barbour, 605; *The Phebe*, 1 Ware, 269.

In all cases where the owner is out of the possession, and there is an intervening possession, or ownership *pro hac vice*, whether it be by formal charter or by verbal hiring, or by sailing on shares, or on a "lay," or by permission or consent, the master is the agent, not of the general owners, but of the ownership which is in possession, managing the vessel. *Reeve v. Davis*, 28 Eng. C. Law, 96; *Bernard v. Aaron*, 103 Ib. 889; *Fox v. Holt*, 36 Conn. R. 571; 4 Benedict, 297; *Tucker v. Stimson*, 12 Gray, 487; *Baker v. Huckins*, 5 Gray, 596; *Webb v. Peirce*, 1 Curtis, 104; *Mayo v. Snow*, 2 Ib. 102; *Bonzey v. Hopkins*, 55 Maine, 98.

The evidence in this cause shows that White was appointed master by Samuel J. Pentz. That he did not consult J. W. D. Pentz and obtain his consent. That J. W. D. Pentz was not in possession of the steamer; did not appoint her master; and had nothing to do with her running or earnings. White therefore, as master, was not J. W. D. Pentz's agent, and did not bind him.

But even if White was master, he is not the general agent of the owners. 1 Parsons Mar. Law, 380.

As such master he is not authorized, without express authority from the owners, to bind them by ordering repairs at the home port, where the owners reside. 1 Parsons Mar. Law, 380, 381, 382, 383, note;

*Jordan v. Young*, 37 Maine, 276, 280; *Elder v. Larrabee*, 45 Ib. 594; *Dyer v. Snow*, 47 Ib. 257; *Woodruff v. Stetson*, 31 Conn. 61; *Fox v. Holt*, 36 Conn. 571; 4 Benedict, 296-7; *Gager v. Babcock*, 48 New York, 154; *Mitcheson v. Oliver*, 85 Eng. C. L. 445; *The Great Eastern*, 2 Adm. & E. Rep. 96, Law Reports, 1867, 1869; *Arthur v. Barton*, 6 Meeson & Welsby, 136; *Taylor v. Steamer Commonwealth*, U. S. District Court E. D. Missouri, reported in vol. 20, No. 9, Int. Rev. Record, August 31st, 1874.

The plaintiffs' prayers are radically defective. Because they blend White's two capacities, as owner and master, together; they ignore the question of agency, whether White acted as master or owner; they ignore the fact that the repairs were made at the home port; and they ignore the facts showing that Pentz was out of possession, and that White had exclusive possession of the vessel.

*Frederick T. Baker & John M. Carter*, for the appellees. This is clearly not a case of ownership *pro hac vice*, even from the appellant's own testimony. To create this relation there must be a transfer or conveyance of some sort from the legal owner to the owner *pro hac vice*, and that arrangement, or the fact that it exists, must be known to the material-man to exempt the legal owner from responsibility for necessary repairs. *Saxton v. Reed*, Hill & Denio N. Y. Supt. Ct. Rep. 328.

White's relation to the vessel was that of *managing* owner and master. The appellant, in his testimony, says he was very seldom on board of her, took no interest in her, and did not know she needed repairs.

The appellees' prayers were properly granted, whether White be considered as master, or master and managing owner. In either case, White was agent of the co-owner, and could bind him for necessary repairs to the vessel, even at the home port.

The first prayer asserts that the appellant having been shown to be co-owner of the vessel, White the other co-owner and master, the repairs to have been ordered by White *as such co-owner and master*, and to have been necessary for the running of the vessel, therefore the plaintiffs were entitled to recover, although no special authority from the appellant may have been shown.

A co-owner, by ordering repairs and other necessities for the employment of a ship, may render his co-owners liable, unless their liability be expressly provided against. Abbott on Shipping, marg. p. 105; *Shemmerhorn v. Loines*, 7 Johnson, 310; *Muldon v. Whitlock*, 1 Cowen, 290; *King v. Lowry*, 20 Barbour, 532; *Hardy v. Sproule*, 29 Maine, 258.

The managing owner and master is agent for the co-owners in ordering necessary repairs. Parsons' Maritime Law, 97, 8-9; *Barker v. Highley*, 109 E. C. L. R. 27; *Whitwell v. Perrin*, 98 Ib. 412.

Especially is this the case in the absence of any known dissent, and this authority extends to the home port. Story's Agency, sec. 40; Collyer on Partnership, sec. 1226; *James v. Bixby*, 11 Mass. 34; *Dawson v. Leake*, Dowling & Ryland N. P. C. 52; Parsons on Shipping & Adm. sec. 100.

The second prayer differs from the first in that it deals with White in his relation as master only. The owners of a vessel are liable for neces-



sary repairs furnished upon the order of the master, unless it be shown that the master had no authority to order them, and that the parties furnishing had knowledge of the want of authority. *Story's Agency*, sec. 298; 3 *Kent's Com. marg.* p. 156; *Rich v. Coe*, Cowper, 686; *Glendon v. Tindler*, Holt's N. P. C. 586; *Holcroft v. Halbert*, 16 Ind. 258; *McCready v. Thorne*, 49 Barbour, 440; *Henshaw v. Rollings*, 5 Louisiana, 385; *Glading v. George*, 3 Grant's Cases, 290; *Winsor v. Maddock*, 64 Penn. 231.

The master, as such, is agent for the owners of a vessel, and has power to bind them for necessary repairs, unless his power has been in some way suspended or restricted, and that suspension or restriction brought home to the creditor. And this authority extends to the home port. *Conklin's Admiralty*, 73-4-5; *Abbott on Shipping*, marg. p. 184; *Provost v. Patchin*, 5 Selden, 235; *Holcroft v. Halbert*, 16 Ind. 258; *Musson v. Fales*, 16 Mass. 385.

ROBINSON, J., delivered the opinion of the court.

This suit was brought against the appellant, part owner of the steamer *Massachusetts*, for work done and materials furnished by the appellees, in repairing said steamer, in the city of Baltimore, the home port, where the appellant resided.

The evidence shows the repairs were necessary, and that they were done upon the order of the captain, who was also at the time part owner of the steamer, but without any authority from the appellant. The main question presented by the record is, whether the captain had the authority under such circumstances, to pledge the credit of the appellant for the repairs thus ordered? It is a question of importance to the commercial interests, and it is to be regretted that the decisions in this country are so conflicting. Without examining at length the many cases in which this question has been considered, it is sufficient to say, that in some states it has been held, that the relation of master and owner, *per se*, confers upon the former authority to bind the latter for necessary repairs, either in a *foreign port*, or in the *home port* where the owner resides. *Glading v. George*, 3 Grant's Cases, 290; *Winsor v. Maddock*, 64 Penn. 231; *McCready v. Thorne*, 49 Barbour, 438; *Provost v. Patchin*, 5 Selden, 235.

In other states this authority has been limited to a foreign port, or to the home port where the owner did not reside, and was not within easy access of the master. *Jordan v. Young*, 87 Maine, 276; *Elder v. Larabee*, 45 Ib. 594; *Woodruff v. Stetson*, 81 Conn. 61; *Fox v. Holt*, 36 Conn. 571; *Taylor v. Steamer Commonwealth*, U. S. District Missouri, Int. Rev. Rec. Aug. 81, 1874; *Parsons Mar. Law*, 380-388, note.

In England, whatever may have been the rule laid down by the earlier cases, all the later decisions hold, that no such authority arises from the relation of master and owner, *per se*; and that in order to bind the owner for necessary repairs done at the home port, the master must have *special authority* for that purpose; or the owner must have held out the master as having such authority; or he must have ratified the contract after it was made.

In *Arthur v. Barton*, 6 Mees. & Wels. 142, Lord Abinger, C. B. said:—

"Under the general authority which the master of a ship has, he may make contracts, and do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged. But this authority does not usually extend to cases where the owner can himself personally interfere, as in the home port, or in a port in which he has beforehand appointed an agent, who can personally interfere to do the thing required. Therefore, if the owner, or his general agent, be at the port, or so near to it as to be reasonably expected to interfere personally, the master cannot, unless specially authorized, or unless there be some usual custom of trade warranting it, pledge the owner's credit at all, but must leave it to him, or to his agent, to do what is necessary.

The rule thus laid down was fully approved and sanctioned by the Court of Common Pleas, in *Gunn v. Roberts*, 9 Com. Pleas, 331 (Law Rep.), in which it was held, that the master had no authority to bind the owner for necessary repairs, either at the home port where he resided, or at a foreign port at which the owner had an agent appointed for that purpose. In that case, as in this, it was contended that the captain was the general agent of the owner; but, Brett, J., said, "That proposition cannot be supported in the fullest sense of the terms in which it was stated. The captain has authority to bind the owners to pay for supplies, or repay money advanced, only when the necessity of the case gives him that authority. In order to give rise to that authority, it has for many years been recognized that two things are necessary: first, it must appear that the money borrowed or goods supplied were necessary for the use of the ship; secondly, it must be shown also that it was *reasonably* necessary that the captain should obtain or order them on the owner's credit. If the captain be in a foreign port, and the owner is not there, and there is no agent of his there, and the captain has not himself been put in funds by the owner, then it may be reasonably necessary that he should order supplies on the owner's credit for the necessary purposes of the ship; but if he is in port in the owner's country, and the owner is there with means to pay for goods, or credit to order them for himself, the owner is the master of affairs, and there is no necessity for the captain to order them, or to pledge the owner's credit, and so there is no necessity for the captain's making a contract to bind the owner."

"The leading case on the subject is *Arthur v. Barton*, and the opinion there expressed by Lord Abinger, as a summary of all the previous authorities, has always been held as a correct expression of the law."

The justice further says: "McLachlan, in his work on Merchant Shipping, 131, correctly states the law as follows: 'As appears from those early cases, but especially the last, there are well defined limits to the exercise of this authority on the part of the master. *First*, in cases where the owner or his agent is at the port of the ship's anchorage, or so near to it as to be reasonably expected to interfere personally, the master cannot, without *special authority* for the purpose, pledge the owner's credit for the ship's necessities.'"

We have quoted at length from the opinion of the court in this case, because it is the latest decision in England, and states correctly, we think, the law on the subject. After all, this question as to the authority of the captain to pledge the credit of the owner for necessary repairs and sup-

plies, rests upon and must be determined by the general principles which govern the law of agency. To a certain extent at least, the captain is and must be treated necessarily as the agent of the owner, and as such, clothed with authority to do whatever may be considered fairly to be within the scope of his appointment. He must of course have the power to do whatever may be *necessary* to enable him to prosecute the voyage. If he should be in a foreign port and repairs are necessary to be done, and the owner is not there, and has no agent there authorized to act for him, the captain must, from the necessity of his position, be considered as having the authority to order such repairs to be done. But in the home port, where the owner resides, where he can be consulted, and where he can personally interfere, no such necessity exists, and there is no reason why the captain should pledge his credit even for necessary repairs, without special authority for that purpose.

If then the captain, as such, had no authority in this case to pledge the credit of the appellant for the work done and materials furnished, does the fact that he was *part owner* at the time confer upon him any greater authority? This question, as well as the question in regard to the power of the captain, depends upon the fact as to whether he was authorized by his co-owner to pledge the credit of the latter. In other words, it depends upon the question of agency. In *Brodie v. Howard*, 84 Eng. Com. Law, 109, Jervis, C. J., says:—

“I think it is now perfectly well understood that these and all similar cases depend upon the question, with whom was the contract made; and that again depends upon the question of principal and agent,—was the party who gave the order for the repairs the agent of the party sought to be charged? Before we consider that, it may be as well to understand what is the position of ‘part owners’ of a vessel. They may be partners generally, or partners in a particular adventure; but that they are not necessarily partners is clearly determined by the case of *Helme v. Smith*, 7 Bing. 709. A part owner, therefore, has not a general authority to bind his co-owners.”

Williams, J.: “I am of the same opinion. It is well established that part owners of a ship are not in the position of ordinary partners.”

But although the mere relation of co-owners does not confer this authority, yet it may be implied from the acts and conduct of the parties. As for instance where the co-owner, upon whose order the materials have been furnished and the work done, has been held out by the other co-owner as having such authority, or where by previous dealings such authority has been recognized.

From what we have said, it follows, that the court erred in granting the plaintiffs’ prayers. We find no error in the refusal to grant the defendant’s prayers. Although the captain in this case had no express authority from the appellant to order these repairs, yet if the latter subsequently ratified the contract thus made, the plaintiffs were entitled to recover. As the case will be remanded for a new trial, we do not propose to comment upon the evidence tending to prove such ratification on the part of the appellant. It is sufficient to say there was evidence on this subject, which ought to have been submitted to the jury.

The proposition of law embraced in the third prayer may be correct in

itself, but has no application to the facts in this case. The question here is not whether White was the captain of the appellant, a registered part owner, or the captain of an owner *pro hac vice*, or the captain of a charter party, and this prayer, which is based upon the decision in *Mitcheson v. Oliver*, 85 Eng. Com. Law, 419, has no application here.

The fourth, fifth, and sixth prayers were also properly refused. The defendant was the registered owner of one half of this steamer, and by his solemn deed of mortgage executed more than two years after the registration, he again declared himself as part owner. So far then as these plaintiffs are concerned he must be considered as part owner, regardless of any private understanding between himself and his brother to the contrary. Having thus held himself out to the public as part owner, if he permitted, or suffered White to assume, and remain in charge of the steamer as captain, the latter must be treated, in a suit by third parties, as the captain in charge, by and with the *privity* and *consent* of the appellant. And although as captain he had no authority to pledge the credit of the appellant for the work done and materials furnished by the appellees, yet he will be held liable, if by his acts and conduct he has ratified the contract thus made by the captain.

What will amount to a ratification, must depend upon the facts and circumstances of the particular case. In speaking of the ratification of unauthorized acts of agents this court, in *Maddox v. Bevan, et al.* 89 Md. 497, said:—

“In many cases it may be inferred from his receiving and holding the fruits of the contract. Long acquiescence also, without objection, and even silence of the principal, will, in many cases, amount to a conclusive presumption of the ratification of an unauthorized act, especially where such acquiescence is not otherwise to be accounted for, or *such silence* is either contrary to the duty of the principal or has a tendency to mislead the agent.”

*Judgment reversed, and new trial awarded.*

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## SUPREME COURT OF MAINE.

(To appear in 64 Me.)

HOW AND FOR WHAT CAUSES AN ATTORNEY DISBARRED. — “GOOD MORAL CHARACTER.”

SANBORN, Petitioner for Penobscot County Bar, v. KIMBALL.

An attorney at law is an officer of the court, and may be removed from office for misconduct, ascertained and determined by the court after an opportunity to be heard has been afforded.

The statute makes “a good moral character” a prerequisite of admission to the bar; and when an attorney at law has forfeited his claim to such character by such misconduct, professional or non-professional, in or out of court, as renders him unworthy to associate with gentlemen, and unfit and unsafe to be intrusted with the powers, duties, and responsibilities of the legal profession, the court may deprive him of the power and opportunity to do further injury under the color of his profession by removing him from the bar.

The evidence in this case conclusively establishes the allegation in the motion that "the respondent does not possess a good moral character," in that it shows that he has committed a fraud upon the court, violated his professional oath and duty, conducted dishonestly in his private dealings, and disregarded the proprieties and civilities due to other members of the profession.

By admitting the respondent to the bar the court held him out to the public as worthy of confidence and patronage in the line of his profession. In view of the power of removal vested in the court, to allow the respondent to continue to exercise his profession after he has been thus proved to be unworthy of his office, would be indirectly to involve the court in the responsibility of his acts. And further, after the disclosures in this case, the court cannot forbear to pronounce the judgment of removal from office against the respondent without abdicating the high trust which the law confides to it in this behalf, and rendering that a nullity.

The respondent has been pardoned for the forgery of which he was convicted and for which he was confined in the state prison; but the instrument forged was a deposition used in a cause before this court; and though the pardon purged him of the offences of which he was convicted, it did not affect the crime of the violation of his professional oath and duty, nor relieve him from the penalty of removal from the bar for this misconduct.

ON report. This was a motion presented by Hon. A. Sanborn, in behalf of the bar of Penobscot County, for the removal of Benjamin Kimball from the office of an attorney and counsellor at law. It prayed for a rule upon Mr. Kimball to show cause why he should not be removed, assigning as causes that he did not "possess a good moral character," in this, that at the February term, 1860, of this court for this county, he was convicted of forgery, for which he was at the following criminal term sentenced to two years' imprisonment at hard labor in the state prison; also, in that he had been guilty of repeated dishonest if not criminal acts, and on one occasion if not more, of obtaining money by false pretences; and in that he had been guilty of unprofessional conduct in wittingly promoting and suing false and groundless suits, and otherwise violated his oath and the duties of his said office.

The motion was made and the rule to show cause granted at chambers in term time, but while the court was not actually in session, returnable to the court in session. At the return day of the rule the respondent moved that the complaint be dismissed or quashed and the rule discharged, because it did not appear by it that he was convicted of a forgery committed when acting as an attorney and counsellor of this court, or in a matter in which he acted as such attorney; that it did not appear but that he had been restored to all his rights by an executive pardon; nor were the persons of whom he obtained money nor the dishonest acts so specified as to enable him to prepare any defence, nor was there any statement of instances of unprofessional conduct; neither was the complaint sworn to, nor had the judge in chambers authority to take any action or make any order thereon, because the notice was defective and insufficient, requiring him to appear before some judge without designating whom, nor that it should be before the court in session; and also because the court could only pass upon his moral character as affected by some act done by him in the capacity of an attorney and counsellor, and had nothing to do with his conduct as an individual or in other relations.

The court then appointed Joseph Carr, Esq., a commissioner to take the testimony relating to this matter, who entered upon and completed

the discharge of this duty without taking any qualifying oath. For this reason the respondent objected to the acceptance of Mr. Carr's report when it was offered; also, because (as he said) a commissioner should only state the testimony and had no right to find facts, or his conclusions from what he deemed to be facts, because he received the proceedings of the Penobscot bar (had before the motion or complaint presented in its behalf was made or any rule served on the respondent) as a specification of the charges upon which these proceedings were based and sent them up to the court with his report, although the same had never been authenticated by the secretary of the bar association; because after the respondent had commenced to take his depositions the complainants were allowed to take the deposition of William P. Tenney, and because testimony was taken of the acts of the respondent as an individual in nowise connected with his professional conduct. Subsequently he filed a motion to strike out all but the charges of a conviction of forgery and of wittingly promoting groundless suits, upon the ground that the other charges were too indefinite to afford any basis of action, and afterwards asked to have this last charge stricken out for the same reason. The minutes of the meeting of the Penobscot bar, annexed to the commissioner's report and referred to in the respondent's motion, set out the report of a committee previously appointed, made to that meeting, in which they reported substantially the conviction of Mr. Kimball of forgery, his sentence and imprisonment; that several years after his release (to wit, in 1878) he returned to Bangor and resumed the practice of his profession there; that he had in the several instances specified obtained money upon false pretences, and had unsuccessfully attempted to do so of various persons mentioned; that he had instituted groundless suits, — one against the gentleman who had him arrested to compel repayment of a loan fraudulently obtained, and another against Ezra C. Brett, Esq., for writing to the governor a letter remonstrating against the appointment of Mr. Kimball to be a justice of the peace upon the ground of his unfitness. In the former of these suits Mr. Kimball obtained a verdict for nominal damages, upon the technical ground that the writ upon which he was arrested was in form a summons and attachment containing no order for an arrest, the attorney neglecting to strike out and insert the few words necessary to change it into a *capias*; the latter suit is still pending. The report also stated the instances of discourteous and improper language and conduct towards other members of the bar which are referred to in the opinion, where will be found a statement of the particular circumstances of his various fraudulent operations that were fully proved.

Mr. Kimball was married in 1858, in Sutton, N. H., and within the year following his wife left him and they never lived together afterwards. In 1859 he applied to this court for a divorce, and to procure it produced what purported to be the deposition of Joseph Greeley, of Sutton, taken before J. H. Allen, Esq., with a regular certificate of that magistrate attached, in which the deponent was represented as testifying that he saw the parties married, knew that Mrs. Kimball returned to New Hampshire in less than a year and had been there ever since, and had told the witness that she should never return because Mr. Kimball was too literary for her, kept himself in his study, cared nothing for balls, &c., of which she was

fond, and that, though she had seen the published notice of his libel, she should not appear nor trouble him, but allow him to have his divorce. The deponent was also represented as answering that he had heard a rumor of her commission of adultery with a person named but knew of no improper relations between them. This deposition and caption were forged by Kimball. He presented and read them at the hearing upon his libel and obtained a decree of divorce. At the succeeding February term, 1860, of this court he was indicted for the forgery, tried and convicted; and at the next criminal term in August, 1860, was sentenced to two years' imprisonment in the state prison. He was committed in execution of his sentence upon the twenty-second day of October, 1860. He introduced in his defence to the present proceedings a certified copy of the petition of A. Sanborn and other members of the Penobscot bar, dated February 9, 1861 (probably it should be 1862), and petitions signed by about four hundred citizens of Bangor, Veazie, and vicinity, praying for his pardon, upon the ground that he had been in the county jail thirteen months before being taken to Thomaston, and no party was actually injured by his forgery, because his wife desired a divorce and had a libel pending in New Hampshire when he made his application, and therefore "whatever of wrong attaches is, in effect, only technical." Upon these representations the executive council on the twenty-first day of February, 1862, advised his pardon, and he was pardoned by Gov. Washburn on that day; the document reciting in the usual form, that "We do hereby grant unto him, the said Benjamin Kimball, a full and free pardon, and restore him to citizenship, of which all our judges, magistrates, officers, &c., are to take notice." This pardon Mr. Kimball now pleaded in bar of any attempt to remove him from his office of attorney on account of the conviction aforesaid. After his release from the state prison Mr. Kimball went to Philadelphia and did not return to Maine till 1873, when he reopened an office in Bangor. The respondent moved and earnestly urged that the whole case with the voluminous testimony, papers, motions, &c., be reported to the full court for its determination thereon, which was assented to by the petitioners and it was reported accordingly, together with the findings of the commissioner.

A. Sanborn in behalf of the Penobscot County bar. This court has power to disbar the respondent. *Ex parte Bradley*, 7 Wallace, 364; *Bradley v. Fisher*, 13 Wallace, 335. His motions were properly overruled. *Randall, petitioner*, 11 Allen, 473; *In re Percy*, 36 N. Y. 651; *Randall v. Brigham*, 7 Wallace, 523. No necessity for the commissioner to be sworn. If the court has the power of removal, argument is unnecessary to show that upon the facts presented an occasion has arisen which demands its exercise. Cases cited *supra*; R. S. c. 79, § 18; *Ex parte Garland*, 4 Wallace, 378; *Ex parte Robinson*, 19 Wallace, 512.

Benjamin Kimball, in his own behalf. Courts will only remove attorneys for contempt or for fraudulent and corrupt practices in his capacity and employment as an attorney and counsellor at law. Over this class of cases they will exercise their summary jurisdiction, but will leave the party complaining to his civil and criminal prosecution for all irregular or dishonest acts committed in a private capacity or employment, where a jury can be empanelled to pass upon the facts. *Bryant's case*, 24 N. H.



154; *Short v. Pratt*, Bing. 102; *In re Knight*, Ib. 142; *In re Morris*, 2 Ad. & El. 582; *Ex parte Boderlour*, 8 Ad. & El. 359. The pardon disposes of the charge of forgery and all its consequences. *Ex parte Garland*, 4 Wallace, 378.

DICKERSON, J. This is a complaint for the removal of the respondent from his office as attorney and counsellor at law. The complaint which is in the form of a motion signed by a Sanborn, Esq., of and for the Penobscot bar, prays for a rule upon the respondent to show cause why he should not be removed from the office of attorney and counsellor at law of this court upon and for the following charges, to wit: "That he does not possess a good moral character, in that at the February term of said court, A. D. 1860, he was convicted of the crime of forgery, and at the next August term of said court he was sentenced to confinement to hard labor in the state prison for the term of two years; and in this, that he has been guilty of repeated dishonest if not criminal acts; and in one instance if not more, of obtaining money by false pretences; and of unprofessional practice in this, that he has wittingly promoted and sued false and groundless suits, and otherwise violated his oath, and the duties of his said office."

An attorney at law is an officer of the court as appears from the terms of his oath of office, to wit: "You will conduct yourself in the office of an attorney within the courts according to the best of your knowledge and discretion, and with all good fidelity, as well to the courts as your clients." The order of his admission to the bar is the judgment of the court that he possesses the requisite legal qualifications and good moral character to entitle him to practise the profession of an attorney at law. From the moment of his entrance upon the duties of his office, he becomes responsible to the court for his official misconduct. The tenure of his office is during good behavior, and he can only be deprived of it for misconduct ascertained and determined by the court after opportunity to be heard has been afforded. In the absence of specific provision to the contrary the power of removal is commensurate with the power of appointment. *Ex parte Garland*, 4 Wall. 378; *Case of Austin et als.* 5 Rawle, 203.

When we consider the duties and powers devolved upon an attorney at law in virtue of his office and the temptations to abuse his professional franchise, the importance and necessity of the power of the court to remove him from the bar can scarcely be overstated. An attorney at law in general may waive objections to evidence, make admissions in pleading or by parol, enter nonsuits and defaults, and make any admission of facts and any disposition of suits that his clients could make. Upon his advice and conduct in the management of causes the protection of the property, reputation, and even the life of his client in a great degree is not unfrequently made to depend. In order to fit him for this trust the possession of a character fortified by high moral principle is indispensable. The statute makes "a good moral character" a condition precedent to his admission to the bar. By his admission the court hold him out to the public as worthy of public confidence and patronage. Upon this indorsement by the court the public have a right to rely, and to presume that his moral character continues to stand approved by the court. If "a good

moral character" is indispensable to entitle one to admission to the bar, it is obvious that the necessity for its continuance becomes enhanced by the conflicts, excitements, and temptations to which the practitioner is daily liable. For his official misconduct there is no power of removal but in the court. This power therefore is at once necessary to protect the court, preserve the purity of the administration of justice, and maintain the integrity of the bar. "The power of removal," says Bigelow, C. J., in *Randall's case*, cited *post*, "was given not as a mode of inflicting a punishment for an offence, but in order to enable the courts to prevent the scandal and reproach which would be occasioned to the administration of the law by the continuance in office of those who had violated their oaths or abused their trust, and to take away from such persons the power and opportunity of injuring others by further acts of misconduct and malpractice."

The power of removal however is a judicial power, to be exercised by a sound judicial discretion, and in accordance with well established principles of law where the evidence is of a conclusive character. But while its use calls for judicial discretion, it also invokes judicial firmness.

The proceedings for the removal of an attorney at law do not partake of the nature of a criminal procedure in which a party has a right to insist upon a full, formal, and technical description of the matter with which he is charged. They are usually commenced by motion to the court, setting forth the misconduct of the attorney in terms that may be readily comprehended by him, and praying for a rule on him to show cause why he should not be removed from the bar for the causes assigned. This course was pursued in the case at bar. The motion contains the general charge that "the respondent does not possess a good moral character," and then states in general terms the acts by which he has forfeited his claim to such character. We think the motion is sufficiently specific to advise the respondent of the charges he is required to meet, and if sustained by the evidence affords sufficient ground for his removal from his office as attorney at law. *Randall, petr. for mandamus*, 11 Allen, 470.

The causes for which an attorney at law may be removed from the bar from the nature of the case are diverse and numerous. He may be removed for violating his official oath; for conviction of perjury or other felony; for attempting to get an opposing attorney drunk in order to obtain advantage of him in the trial of a cause; for obtaining money of his client by false pretences; for advocating the admission in evidence of a forged copy of a letter, knowing it to be forged when offered by his associate counsel; for ceasing to possess "a good moral character;" and for any ill practice attended with fraud and corruption, and committed against the principles of justice and common honesty. *Ex parte Bramhall*, Coop. 829; *Austin's case*, cited *ante*; *Dickens's case*, 67 Penn. St. R. 169; *People v. Ford*, 54 Ill. 520; *Rice v. Commonwealth*, B. Monroe, 484; *Mills's case* 1 Mann. 393; *In re Percy*, 36 N. Y. 651; *Bryant's case*, 24 N. H. 155; *Burr's case*, 1 Wheeler's Crim. L. 503; *Leigh's case*, 1 Munf. 481.

It is a mistaken view of this subject as the foregoing authorities show, to conclude that an attorney at law can only be disbarred for acts done "in his office as attorney," or "within the courts," in the terms of his oath of

office. On the contrary, an attorney may be guilty of disreputable practices and gross immoralities in his private capacity and without the pale of the court, which render him unfit to associate with gentlemen, disqualify him for the faithful discharge of his professional duties in or out of court, and render him unworthy to minister in the forum of justice. When such a case arises from whatever acts or causes, the cardinal condition of the attorney's admission to the bar, the possession of "a good moral character," is forfeited, and it will become the solemn duty of the court, upon a due presentment of the case, to revoke the authority it gave the offending member as symbol of legal fitness and moral uprightness, lest it should be exercised for evil or tarnished with shame.

In *Leigh's case*, cited *ante*, Judge Roane says: "None are permitted to act as attorneys at law but those who are allowed by the judges to be skilled in law, and certified by the court to be persons of honesty, probity, and good demeanor. Having obtained the sanction of the court touching these two particulars, an attorney is licensed or allowed to practise, and the court have also a continuing control over him, with power to revoke his license for unworthy practices or behavior."

In *Percy's case*, cited *ante*, the court says: "It is insisted by the appellant that the misconduct justifying the removal is some deceit, malpractice, or misdemeanor practised or committed in the exercise of the profession only, and that general bad character or misconduct will not sustain the proceedings. We cannot concur in this position. It has been seen that the right of admission to practise is made by the statute to depend upon the possession of a good moral character joined with the requisite learning and ability. It is equally important that this character be preserved after admission while in the practice of the profession, as that it should exist at the time. It would be an anomaly in the law to make good moral character a prerequisite to admission to an office of a life tenure, while no provision is made in case such character is wholly lost."

In *Mills's case*, cited *ante*, the court held that a bad moral character is good cause for disbarring an attorney. In that case Whipple, C. J., remarks as follows: "Should this court, after being officially advised that one of its officers has forfeited the good name he possessed when permitted to assume the duties of his office, still hold him out to the world as worthy of confidence, they would in my opinion fail in the performance of a duty cast upon them by the law. It is the duty they owe to themselves, to the bar, and the public, to see that a power which may be wielded for good or for evil is not intrusted to incompetent or dishonest hands. The extreme judgment of expulsion is not intended as a punishment inflicted upon the individual, but as a measure necessary to the protection of the public, who have a right to demand of us that no person shall be permitted to aid in the administration of justice whose character is tainted with corruption."

Upon passing from the law to the facts in the case before us, we find that the first specification relied on to establish the general charge that "the respondent does not possess a good moral character" is proved. He was "sentenced to confinement and hard labor in the state prison for the term of two years," as charged in the motion. The crime for which he was convicted and sentenced was the forgery of a deposition and caption

thereto annexed which were offered in evidence by him, and admitted by the court on the trial of a libel for divorce brought by him against his wife, Marilla Kimball.

But we further find that he has been pardoned by the executive for that offence. The effect of that pardon is not only to release the respondent from the punishment prescribed for that offence and to prevent the penalties and disabilities consequent upon his conviction thereof, but also to blot out the guilt thus incurred, so that in the eye of the law he is as innocent of that offence as if he had never committed it. The pardon as it were makes him a new man in respect to that particular offence, and gives him a new credit and capacity. To exclude him from the office he held when he committed the offence is to enforce a punishment for it notwithstanding the pardon. *Ex parte Garland*, 4 Wallace, 380.

But the respondent in his capacity as attorney offered the deposition and caption forged by him as evidence in court, and they were admitted. This act was a palpable violation of his official oath, which bound him "to do no falsehood nor consent to the doing of any in court." It was also an indignity offered to and a fraud upon the court and the law. By that act the respondent not only struck a fearful blow at the administration of justice, but he betrayed confidence, practised deceit, degraded himself, and turned recreant to virtue. It is obvious that an attorney at law who is guilty of such an act does not possess that "good moral character" which the statute makes a prerequisite for admission to the bar, and which is indispensable in the practice of the profession. *Rice v. Commonwealth*, 18 B. Monroe, Ky. 475.

The executive pardon affords the respondent no protection from the consequences which the law attaches to this offence. Pardon for one crime does not release a party from the penalties and disabilities consequent upon the commission of another. A pardon for forgery does not prevent a party from suffering the consequences attached to a conviction for adultery or larceny, nor blot out the guilt inseparable from such crimes and give their perpetrator a new character for chastity and honesty. The indictment upon which the respondent was convicted contains no count for a violation of his official oath or for a fraud upon the court. The respondent's pardon for forgery can no more obliterate the stain of guilt for those offences than the judgment in that case would be a bar to an indictment for their commission.

Nor has that act been condoned by lapse of time. Though the respondent's conviction and sentence took place in 1860, the delay has not been very considerable if we take into account the term of his imprisonment and his absence from the state. The offended husband or wife not unfrequently consents to continue or resume the relations of wedlock in the hope of an improved state of things without intending to condone previous causes of grievance, should such hope prove delusive. For the same reason also the court sometimes suspends sentence or even forbears to pronounce it. The forbearance in this case was doubtless prompted by the hope of an improvement. However this may be, the respondent has no legal or moral ground to complain that he has been suddenly or summarily dealt with, or that he has been allowed an opportunity for repentance and reformation. How he has improved the interval granted him the sequel shows.

We also find the respondent guilty of dishonesty and bad faith toward his client, Thomas Frost. The evidence shows that Frost gave the respondent a retainer of \$10 to defend him from an indictment for an assault with an intent to commit murder, and \$20 more when the court was in session; that the respondent examined Frost's witnesses and told him to discharge them, and to "leave the case with him to fix up;" that "he had seen the parties and if Frost would let him have the money he would fix it up right away."

The respondent wanted \$200 for that purpose which Frost let him have, and then went home. Upon being advised by his bondsman to return to court and look after his bond, Frost returned, found that nothing had been done, but was again assured by the respondent "that something would be done in a day or two." Nothing however was done, and Frost demanded the \$200 of the respondent but recovered only \$55, the balance being claimed by him for his services in the case.

The crime charged was one that the law does not allow to be compromised by the parties. The respondent was poor and Frost was in good credit. Neither the injured party nor the county attorney was introduced to show what efforts if any the respondent made to adjust the matter. Nor did the respondent offer his own testimony to remove the cloud that rests upon his professional conduct in this transaction. The evidence forces upon us the conviction that the respondent dealt falsely and dishonestly with his client, and in a manner utterly inconsistent with that "good moral character" which he should have possessed. The pretence that the respondent had a right to retain the money for his services is too transparent to mislead any discerning mind. The evidence shows that the money retained by him was not and could not have been obtained for that purpose, and that not a tithe of it was earned by him in the cause.

The specification of dishonest practices in obtaining money is established in several instances. The evidence shows that he went to Etna and obtained thirty dollars of Samuel R. Dennett, a farmer of that town whose acquaintance he had made the February previous while Dennett was attending court as a juror, upon the false statement that John C. Friend of Etna owed him sixty dollars. The respondent has never refunded the money though he promised to do so on the next day. He also obtained fifteen dollars of Seth Emery of Bangor, at an early hour in the morning, upon the representation that he had a check on which he expected to get the money and would pay the money as soon as the bank was opened. He never paid the money, and in the absence of any explanatory or exculpatory evidence to the contrary which it was in the power of the respondent to offer if any such existed, the inference is irresistible that he had no such check as he pretended to have. In another instance he obtained twelve dollars from a gentleman in Waterville upon representing that he had lost his pocket-book, was doing an extensive business in Philadelphia, and had no money to pay for his team and hotel bills, and upon his promise to remit the amount the next day from Bangor. As he neither sent the money nor would answer the gentleman's letters, the latter caused him to be arrested at the hotel in Waterville and thus collected his debt. His largest operation in the same direction that has been disclosed in

this proceeding is in the case of William P. Tenney, who let him have some fourteen hundred dollars at different times, solely upon his express representation that it was intended to be used, and his agreement that it should be used, to purchase soldiers' scrip or bounty, and that Tenney should have one half of the profits. After the earnest efforts of Tenney to obtain satisfaction, the result was his recovery of \$400, the confession of Kimball that he had invested the balance in real estate in Sidney, and the tender of his worthless note for that amount. Other instances there are of successes and failures in obtaining money by means scarcely less disreputable though not so palpably dishonest.

As instances of unprofessional conduct and a disregard of the amenities of the profession may be mentioned his calling E. C. Brett, Esq., a member of the Penobscot bar and clerk of his court, a liar; in causing the name of Henry L. Mitchell, Esq., also a member of that bar, to be erased under an action without authority and in having his own name inserted instead; and in putting his own name under an action defended by James W. Donigan, Esq., another member of said bar, without authority, and threatening "to flog him in the street if it was stricken off."

The specification of wittingly promoting and suing groundless suits is not sustained. In the one instance adduced the verdict of the jury was in favor of the respondent, then plaintiff, for nominal damages; and in the other the declaration seems to set forth good cause of action, whatever the proof may turn out to be, and as a jury may be called upon to try it, the court will not presume beforehand to pronounce it false and groundless.

Our conclusion is that independently of the act of the respondent in offering the forged deposition and caption as evidence in court, the allegation in the motion that "the respondent does not possess a good moral character" is clearly established. With the evidence of that fact the case does not admit of a scintilla of doubt. The evidence discloses not merely a single instance of moral delinquency, disreputable practice, and professional misconduct, but a series of them, showing the respondent to be unfit and unsafe to be entrusted with the powers, duties, and responsibilities of the legal profession. No court would for a moment consider the claims of an applicant for admission to the bar who should be shown to possess such a moral character. If the violation of his oath of office, fraud upon the court, bad faith toward clients, dishonesty in his dealings as an individual, and disregard of the courtesies and proprieties due to the other members of the profession should operate a forfeiture of the office of an attorney, the respondent has no longer any claim or right to enjoy that office.

Unpleasant as is the duty, grave as is the responsibility devolved upon us, and serious as must be the consequences to the respondent, we cannot forbear to pronounce the extreme judgment of removal without failing to discharge the high trust which the law reposes in us, and which is indispensable to the maintenance of the dignity of the bench, the integrity of the bar, and the purity of the administration of justice. Indeed to refuse to do so in this case would be virtually to abdicate this trust and render the law creating it a nullity. The guaranty which the law in this behalf provides for the security of the public must be maintained inviolate.

We have carefully examined all the respondent's objections to the pro-

ceedings before the court at *nisi prius*, including his motions to dismiss, strike out, and quash, and also to reject and amend the report of the commissioner, but we find nothing in them for which he has any legal ground of complaint. The objection that the commissioner to take the testimony was not sworn is not well taken. Assessors, auditors, and referees appointed by the court are not required to be sworn, nor is a commissioner to take evidence. So also was it competent for the judge to receive the complaint and grant the rule to show cause at chambers returnable to the court in session. As we have before seen, the same strictness, formality, and technicality are not required in this proceeding as are requisite in other cases.

The judgment must be, *the respondent to be removed from his office as attorney at law in all the courts of this state.*

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### SUPREME COURT OF MICHIGAN.

[OCTOBER, 1875.]

#### WITHDRAWAL OF OPPOSITION TO BANKRUPTCY PROCEEDINGS AS CONSIDERATION OF CONTRACT.

SANFORD, Executrix, v. HUXFORD.

The withdrawal of opposition to bankruptcy proceedings already begun, is a valid consideration for an agreement made by the petitioning creditors with the defendants in bankruptcy.

CAMPBELL, J., delivered the opinion of the court.

Suit was brought below on an agreement by defendants to furnish to Jessie Crowell the value of a certain house formerly owned by him, or means to buy it, and also money enough to support him. The alleged consideration was his withdrawal of opposition to certain bankruptcy proceedings pending against his firm, and consent to amendments and an adjudication against them. A separate count contained the averment of an additional agreement to procure the withdrawal of opposition by the other partners.

The facts averred are set forth substantially as follows: On the 8d day of February, 1871, Crowell owned the dwelling-house property in question, at Albion, which is valuable. On the 15th of October and until February 17, 1871, he was a member of a commercial firm at Albion, under the style of J. Crowell & Co., composed of himself, William V. Morrison, and Osmon Rice. The firm was indebted to various creditors, among whom were the defendants and the First National Bank of Marshall, and the National Exchange Bank of Albion, of which latter Irwin was president. On the 4th of November, 1870, these two banks (the latter by Irwin as its president) filed a petition in bankruptcy against the firm, with the necessary jurisdictional allegations, averring an act of

bankruptcy by the suspension of payment of their paper, and also setting up individual acts of bankruptcy against Rice. On the 23d of November the respondents in bankruptcy joined issue denying the acts of bankruptcy and demanding a trial by jury, which had not come to trial on the 14th of February, 1871, when Crowell withdrew and procured the others to withdraw opposition, and consented and procured their consent to the steps contemplated by the contract. On the 8d day of February, 1871, the contract is alleged to have been made as before mentioned. On the 9th of March, defendants proved their debts and became parties to the proceedings.

The defendants demurred to the special counts, the grounds of demurrer being, *first*, that the declaration sets out no consideration for the promises of the defendants; *second*, that the contract was void as against public policy; and *third*, that it was a fraud on the partners of Crowell. The demurrer was sustained, and error is brought on the rulings.

The objection for want of consideration rests on several distinct grounds, which were in substance that there was nothing showing a doubtful case, or a defence or belief in a defence in good faith, to the bankruptcy, and nothing to show that the proposed amendments were material, or that defendants could have been benefited or Crowell injured by his consent to the adjudication. It is insisted that all these, or enough of them to make out a consideration, should affirmatively appear.

If the arrangement was not illegal, it is not disputed that it may be upheld if any valid consideration appears. But it is claimed there is no presumption of that kind arising out of the facts set out.

The rule as to consideration for agreements to abstain from litigation, present or contemplated, does not seem to differ from that relating to any other contracts, although upon the facts, difficulties often arise. The rule seems to be well determined that there must be a benefit on one side or a detriment suffered or service done on the other. We find nothing to indicate that the benefit rendered need be to the party contracting, if it is to any one else at his procurement or request, any more than in other contracts. And in the present case, if the arrangement made was to the detriment of Crowell as for the advantage of the petitioning creditors, it is not important what share defendants may have had in the advantage. *Pullen v. Stokes*, 2 H. Bl. 312; *Smith v. Algar*, 1 B. & Ad. 603; *Anonymous*, Cowp. 129; *Rood v. Jones*, 1 Doug. 188.

It is admitted that if Crowell lost any advantage which he had a right to insist upon, or if the creditors obtained an advantage otherwise not obtainable, and which Crowell had a right to withhold, or if there was an honest doubt concerning their respective rights, there would be a sufficient consideration. But it is not admitted that the declaration shows this.

By withdrawing opposition to the bankruptcy proceedings, and consenting to amendments and to a decree, Crowell divests himself of the possessory control and of the legal ownership of his whole estate, and subjected it without further delay to the disposition of the bankrupt court, and to ratable distribution by an assignee among his creditors. He had a right to the control of it until otherwise ordered by the bankrupt court, and he could not lose title to it unless adjudged a bankrupt.



If not so declared he would have retained the dominion recognized by the common law and state statutes, and could apply it as he saw fit, so long as he committed no fraud. He thereby gave up a positive value in present enjoyment, and a contingent right of absolute control and dominion, in case he succeeded on the issue.

That these were valuable rights cannot be doubted. The courts regard involuntary bankruptcy as an injury to which a party should not be subjected except for his legal omissions or violations of duty. The supreme court of the United States has recognized this principle very plainly in refusing to raise presumptions of fraud to bring transactions within the statutes. See *Mays v. Fritton*, 20 Wall. 414, following *Wilson v. City Bank*, 17 Wall. 478, in which the subject is fully discussed. Mr. Justice Miller says, concerning involuntary bankruptcy (p. 482): "But when a person claims to take from another all control of his property, to arrest him in the exercise of his occupation, and to impair his standing as a business man, in short to place him in a position which may ruin him in the midst of a prosperous career, — the precise circumstances or facts on which he is authorized to do this should not only be well defined in the law, but clearly established in the court." And Lord Kenyon in *Kaye v. Bolton*, 6 T. R. 134, sustaining an argument to withdraw bankruptcy proceedings, on the promise of a third person to pay creditors, as entirely reasonable, says: "It would be monstrous to say that the bankrupt's estate shall still be torn in pieces by the expenses of the commission." Common experience shows that an estate can seldom be applied in bankruptcy as prudently or economically as in private hands by debtors, and that often (as remarked by Miller, J., in 17 Wall. 486), "by forbearance of creditors, by meeting only such debts as are pressed, and even by the submission of some of their property to be seized on execution, they are finally able to pay all, and to save their commercial character and much of this property."

The law gave Crowell an absolute right to contest these proceedings before a jury, of which he could not be deprived except by consent. This right he surrendered by the agreement in question, if made as alleged.

On the other hand if we assume the allegations to be true, it appears, and must be taken as true, that the creditors of the firm thought it for their advantage to procure a decree in bankruptcy, and were willing to pay a large price for that privilege. They, and not Crowell, appear as the parties anxious for a withdrawal of the legal controversy to be submitted to the jury, and for a confession of judgment (or what is analogous to that), which would expedite their proceedings and prevent absolute delay and possible failure. It is plain that this was in fact, and was considered, an advantage. We have, then, a double consideration, whereby Crowell gave up important rights, and the creditors gained important advantages.

It is urged, however, that unless Crowell had a defence, or at least a case of doubt in his favor, there was no justice in defending, and therefore no consideration for abstaining, which the law can favor. And reference is made to compromises where no suit has been commenced, as standing on the same footing with cases in litigation. There are some cases which appear to confound the distinctions, and which may deserve

consideration, although upon the present declaration without amendment it is doubtful whether it is very important. But the questions are before us and cannot be regarded as foreign to the case.

It has been held that a party who gets an agreement in his favor by a relinquishment or an agreement to relinquish a right, must have some right or some show of right to relinquish. This was held in *Edwards v. Baugh*, 11 M. & W. 641, in regard to a declaration or an agreement to abstain from prosecuting, which did not aver any debt actual or supposed. This case, however, contains an express assertion that if suit had been commenced before the compromise, no such showing would be needed, and the saving of litigation and its attendant expenses would be a sufficient consideration in itself. In *Cook v. Wright*, 1 B. & S. 559, the court intimates that the declaration in *Edwards v. Baugh* was sufficient, and that the decision was questionable. In *Kaye v. Dutton*, 7 M. & G. 807, the consideration was confined to the transfer of an interest, and held bad because there was none. In *Jones v. Ashburnham*, 4 East, 455, it was held an agreement to forbear suit was nugatory unless it was in favor of some person named or otherwise designated, and in that instance there was no person liable to suit indicated or existing. In *Barber v. Fox*, 2 Wm. Saund. 186, an heir's promise based on a bond in which there were no words binding heirs was held invalid, as in *Fooley v. Windham*, Cro. El. 206, was a promise to compensate a personal tort of an ancestor, on which there was no surviving cause of action. In *Seaman v. Seaman*, 12 Wend. 381; *Busby v. Conway*, 8 Md. 55; *Praler v. Miller*, 25 Ala. 320, it was held an agreement not to oppose a will formed no consideration for a compromise unless the party would be in some way interested in its defeat. See also *Jeress v. Sutton*, 3 Ind. 289. And in *Rood v. Jones*, 1 Doug. 188, it was held an agreement not to attach property, where there was nothing to attach, was no consideration for a promise. But in the latter case, as in the best considered cases generally, it is also held that when parties have acted without fraud, the burden is on the defendant to defeat the agreement which will be presumed good until facts are alleged against it to invalidate it. *Paris v. Dexter*, 15 Vt. 379; *Wade v. Simeon*, 2 C. B. 565; *Gould v. Armstrong*, 2 Hall S. C. 267. And if parties act in good faith, even when they know all the facts, and there is a promise without legal liability to base it on, the courts hesitate to disturb the agreements of parties, or any assumption that an advantage which they have obtained, and conceive to be worth paying for, is not to be considered valuable. The decisions in this state have gone far to sustain such bargains. *Weed v. Terry*, 2 Doug. 344; *Vandyke v. Davis*, 2 Mich. 148; *Moore v. Detroit Locomotive Works*, 14 Mich. 266; *Hull v. Swartout*, 29 Mich. 249; *Gates v. Shutts*, 7 Mich. 127. In *Vandyke v. Davis*, the party had no title whatever. In *Moore v. Locomotive Works*, the defendant had become liable for not delivering machinery, and it was regarded as an advantage gained to the plaintiff to get the property instead of a lawsuit for damages, so as to uphold a waiver of delay. In *Gates v. Shutts* the claim was supposed to be barred by the statute of limitations.

The decisions generally hold that an agreement to settle an existing suit is sustainable without reference to the merits of the controversy, un-

less under very peculiar circumstances. It is so held on the ground that an alteration in the position of the parties may of itself be an advantage; and may, in the absence of fraud or other controlling reason, be a sufficient consideration. In *Cook v. Wright*, 1 B. & S. 559 the court held that there could be no doubt whatever that the compromise of a suit was a sufficient consideration; but that the reason was not the saving of costs, but the change of position, and that in all cases where parties had so changed their position, the same rule would apply. There a person not personally liable for a rate, had compromised it with commissioners and agreed to pay the reduced sum, both knowing the facts but differing as to the law; and he was held liable. In *Barlow v. Ocean Ins. Co.* 4 Met. 270, it was held a settlement with an insurance company could not be disturbed by the subsequent discovery of facts which would have prevented it, if known. In *Wade v. Simeon*, 2 C. B. 565, it was said that the fact that a plaintiff knew he had no cause of action would not necessarily defeat a compromise unless he knew he could not under any circumstances have got a verdict. In *Gould v. Armstrong*, *supra*, the test was likewise stated to be whether there "could be" any recovery. In *Union Bank v. Geary*, 5 Pet. 113, the parties were not ignorant of the facts but the law was doubted. So in *Longridge v. Dorville*, 5 B. & Ald. 117, it was held a compromise would not fail unless it was clear there could be no possible liability.

The cases refer among other things to the contingencies of losing testimony as not to be disregarded. And in *Cooper v. Parker*, 15 C. B. 822, the doctrine is very broadly laid down. A defendant had pleaded infancy, which was not true in fact. The suit was compromised for a smaller sum, and that plea was by the same agreement withdrawn. The court held the plaintiff bound. Parke, B., uses this language: "I cannot see why this is not a good plea. The value of the defendant's giving up the question in the action in the county court cannot be ascertained. In dealing with a plea of this sort, the court does not enter into a consideration of the value of the satisfaction if the plaintiff agrees to accept it. The advantage to the plaintiff of the defendants giving up the plea of infancy in the county court, though an untrue one, might be great." Martin, B., very briefly concurs by saying still more broadly that the parties should be allowed to have their agreements carried out as they make them. The decision was unanimous.

It is also held that the presumption will always be raised that pleadings are not put in for sham purposes or in bad faith, and that they cannot be attacked except upon averments to the contrary. *Bidwell v. Catton*, Hobart, 216; *Smith v. Monteith*, 13 M. & W. 426; *Wilson v. City Bank*, 17 Wall. 473.

There is no reason for presuming unfairness when parties are merely relying on their legal rights, and no reason why they should be debarred from demanding compensation for giving them up. If there have been unfairness in bringing about a settlement, the want of any honest cause of action or probable defence may be a fact to be considered among the rest.

In the present case Crowell does not appear on the pleadings as the moving party, and there is nothing to indicate fraud. He gave up

valuable privileges, and the creditors got valuable benefits thereby, on which they put their own estimate. The bargain cannot be presumed to have been fraudulent, and the consideration is valid, unless the whole transaction was unlawful.

Upon the general question, see farther, *Morey v. Newfane*, 8 Barb. 653; *Stoddard v. Mix*, 14 Conn. 12; *Farmers' B. K. v. Blair*, 44 Barb. 652; *Atlee v. Backhouse*, 3 M. & W. 638.

So far as any question arises concerning fraud against Crowell's partners, we do not perceive how it can be presented on this record. If defendants could set up any fraud against them to avoid the contract, upon which we need not pass here, such fraud is not to be presumed. And under the second count which avers their consent, it must be likewise presumed to have been fairly obtained.

Neither do we think there is any ground for holding such an agreement to be in fraud of the bankrupt law. It has been held that secret agreements by favored creditors to withdraw opposition to the discharge of debtors or to abstain from examining them are void, because by their position in the case, other creditors are at liberty to rely on their prosecuting all necessary inquiries and developing all important facts, which such agreements tend to smother. It is held such arrangements have a direct tendency to favor fraudulent dealings with assets, and to conceal the truth upon the merits. *Hall v. Dyson*, 10 L. & Eq. 424; *Dexter v. Snow*, 12 Cush. 594; *Taxbury v. Miller*, 19 J. R. 311; *Bell v. Leggett*, 3 Seld. 176; *Nerot v. Wallace*, 3 T. R. 17. And on similar principles a secret promise to pay a creditor, who signs a compromise with others, and so induces them to regard him as acting without such an inducement, is held fraudulent. *Case v. Gerriah*, 15 Pick. 49.

But a debtor who devotes all his property to be used ratably for all his creditors does what the law highly favors and approves. This is the very aim and purpose of the bankrupt law, and the only end for which the petition in bankruptcy was filed. No act can be in fraud of a law which it is intended and calculated to carry out. Crowell merely bargained to submit to the purposes of this law, when he had before resisted the attempt to bring him within it. If it had been a bargain to conceal or withdraw his assets from distribution, or to procure a collusive discontinuance of the suit after other creditors had appeared, there might have been some reason for doubting its validity. But an agreement to submit to a bankruptcy decree and to have the estate disposed of in due course of law is entirely proper and valid.

The judgment should be reversed, and the demurrer overruled, with costs, and the cause remanded to the court below, that the defendants may plead over.

## CIRCUIT COURT OF THE UNITED STATES. — NORTHERN DISTRICT OF GEORGIA.

[OCTOBER, 1875.]

## WILMER v. THE ATLANTA AND RICHMOND AIR LINE RAILWAY.

- (1.) A railroad company having its residence and principal office at Atlanta, Georgia, conveyed to trustees by one deed, all its line of road extending from Atlanta through South Carolina to Charlotte, North Carolina, and other property to secure the payment of the principal and interest of 4,248 bonds of \$1,000 each, issued by the railroad company. The railroad was an indivisible and inseparable piece of property, which could not be divided, without injury to its value. The trust deed conferred authority on the trustees, and made it their duty, in case the railroad company failed, to pay either the interest, or principal of the bonds, to take possession of the property conveyed by the trust deed, and advertise and sell the same or such part as might be necessary at Atlanta, to pay the sum in default. *Held* : —
- (a.) That on default made in the payment of interest and a demand upon the trustees by the bondholders that they should take possession of the trust property and a failure of the trustees to do so, the court on a bill filed by the bondholders to require them to execute the trust would compel them to take possession of the trust property or appoint a receiver for that purpose.
- (b.) Such appointment would be made even though there was no probable deficiency of the trust property to pay the debts, secured by the trust deed.
- (c.) When it was represented that the trust property had fallen into the hands of two different receivers, accountable to three different courts, to the manifest detriment of the trust estate, that fact of itself was considered a sufficient reason for the appointment of a receiver for the whole property, if the court had jurisdiction to make such appointment.
- (d.) The circuit court of the United States for the Northern District of Georgia has jurisdiction to appoint a receiver for the entire line of said company's road, and other property included in the deed of trust whether within or without the state.
- (2.) Two states may by concurrent legislation unite in creating the same corporate body.
- (3.) Where a bill was filed the prayer of which was that this court would construe a trust deed executed by a railroad company, and compel the trustees to execute the trust or appoint a receiver to take possession of, and administer, the trust property, and service of subpoena had been made on the railroad company, which was the principal defendant, and a restraining order had been allowed, and also served on the railroad company, enjoining it from delivering possession of the trust property to any one except a receiver, appointed by this court in the case thus commenced, *held*, that by these proceedings the court acquired constructive possession of the trust property; and that possession thereof taken, under color of process from another court, in a suit commenced after the proceedings above mentioned, was in contempt of the process and jurisdiction of this court, even though the other court first obtained actual possession of the property. (Per Woods, Circuit Judge.)
- (4.) *Contra*. Service of process gives jurisdiction over the person; seizure gives jurisdiction over the property; and until the property is seized, no matter where the suit was commenced, the court does not have jurisdiction over it. Thus, when two suits between different parties, raising different controversies, and having different purposes in view, are commenced in courts of coördinate jurisdiction, and the possession of the property, which is the subject of the suit, is necessary to the relief asked in each case, that court which first seizes the property acquired jurisdiction over it, to the exclusion of the other, no matter when the suits were commenced, or process in *personam* served. (Per Bradley, Circuit Justice.)
- (5.) When certain bondholders secured by a deed of trust, filed, in behalf of themselves and all other bondholders secured by the same deed, who chose to come in as complainants, and bear their share of the expenses of the suit, a bill against the trustees named in the deed, to have the trust administered, and the trust property sold, and

its proceeds distributed, and the other bondholders were numerous and some of them unknown; *held*, that it was no valid objection to the making of a decree, in accordance with the prayer of the bill, that all the bondholders were not made parties; they might be allowed to come as complainants, or might propound their claims before the master.

- (6.) A trust deed executed by a railroad company to secure bondholders construed.
- (7.) When a railway is conveyed by a trust deed or mortgage to secure bonds, and it cannot be divided and sold in pieces without manifest injury to its value, the whole may be sold, before the principal is due, on default in the payment of interest.
- (8.) If two railroad corporations created by different states join in making a trust deed conveying their joint property to secure bonds issued by them jointly, and suit is brought to enforce the trust, in the district where one of the corporations resides, and it is served with process, and the other corporation, being a non-resident of the state or district where the suit is brought, enters its appearance and files an answer jointly with the other, both will be bound by the decree of the court.
- (9.) The Atlanta & Richmond Air Line Railway Company executed the deed of trust, mentioned in the first head note: *Held*, that the court has jurisdiction to decree that the trustees should sell the entire line of road according to the terms of the trust, notwithstanding, a large part of the road lay beyond the territorial jurisdiction of the court; and that a sale and deed under such decree would convey a good title to the whole.
- (10.) Penalty of bond for appeal fixed under rule 32 of the supreme court.

THIS was a cause in equity which was first heard in chambers at Savannah, on the 5th and 7th of December, 1874, by Woods, C. J., on the motion of complainants, for the appointment of a receiver.

Messrs. A. T. Ackermann & L. E. Bleckley, for the motion, and Messrs. P. L. Mynatt & H. H. Marshall, *contra*.

WOODS, Circuit Judge. The complainants, Skipwith Wilmer and August Richard, allege that they are the owners and holders of certain of the bonds known as first mortgage eight per cent. bonds of the Atlanta & Richmond Air Line Railway Company, which are secured by a deed of trust on all the property and franchises of the defendant company, and they file this bill, in behalf of themselves and all other holders of similar bonds, who shall be entitled to avail themselves of the benefit of the suit. The purpose and prayer of the bill is, that the trust deed given to secure said bonds may be construed that the trustees therein named, or their substitutes to be appointed by the court, may be compelled to execute the trusts created by the deed of trust, by taking possession of said railway and appurtenances, and all property granted by the deed of trust, and selling the same at public auction, for the payment of the principal and interest of all the bonds secured by said trust deed, and that pending the suit some suitable person may be appointed receiver to take possession of said railway and all its property conveyed by the trust deed, with power to operate and manage said railway, and receive all its earning and income during the pendency of the suit, and with such other power as to the court shall seem right and proper.

The cause now comes on for hearing, upon the motion of the complainant for the appointment of a receiver, as prayed in the bill.

It is alleged in the bill that the defendant company is a corporation, created by, and existing under the laws of the State of Georgia, South Carolina, and North Carolina, and having its principal office and place of business in Atlanta, in the State of Georgia.

It further appears from the bill that, by an act of the Legislature of Georgia, approved March 5, 1856, a railroad company, to be known as "the Georgia Air Line Railroad Company," was incorporated and author-

ized to build, equip, and enjoy a railroad from Atlanta to the South Carolina State Line in the direction of Anderson Court House

By an act of the General Assembly of South Carolina, ratified December 20, 1856, the Air Line Railroad Company of South Carolina was incorporated, with authority to construct a railroad from the line of the State of Georgia, in the direction of the city of Atlanta, to Anderson Court House, and thence to some point of connection, with the Charlotte and South Carolina Railroad in the direction of Charlotte, North Carolina, and to equip and enjoy the same.

The seventh section of this act of incorporation provides that it shall and may be lawful for the said company to combine or unite with any other railroad company having the right so to do, and to consolidate the management of the companies so combining, if they shall deem it necessary, and to make any regulations for the use of or combination of the interest or management of said roads as the public good may require, or to them may seem meet.

By an act of the Legislature of North Carolina, ratified August 3, 1868, it was provided that the Air Line Railroad Company in South Carolina was authorized "to extend, construct, equip, and operate its road within the limits of North Carolina, from any point on the South Carolina line to the town of Charlotte, in North Carolina."

These three acts being in force, the Legislature of Georgia, by an act approved September 7, 1868, declared "that the Georgia Air Line Company be and they are hereby authorized to consolidate, combine, or unite with any other railroad company or companies directly, or indirectly connecting therewith (or to unite the management of said companies), upon such terms, conditions, and provisions as shall be agreed upon by and between such companies so consolidated or uniting, and thereupon such consolidated or united companies shall be invested in this state with all the rights and privileges conferred upon, be subject to all the restrictions imposed by the original charter of the said Georgia Air Line Railroad Company, and the amendments thereto, with the right to adopt such other or modified corporate name, and to increase and diminish the number of directors now provided or as shall be determined on and agreed upon by such companies." And the Legislature of South Carolina by an act approved September 18, 1868, entitled "An act to amend an act entitled an act to incorporate the Air Line Railroad Company in South Carolina," declared (Section 2) "that if said company shall, as authorized by its charter, consolidate or unite with any other company or companies, it may adopt such other or modified corporate name and increase or diminish the number of directors now provided for as shall be deemed best and agreed upon by such companies."

In pursuance of the authority granted by these acts of the Legislatures of Georgia and South Carolina, it is alleged that, on June 20, 1870, the Georgia Air Line Railroad Company, and the Air Line Railroad Company in South Carolina by an agreement in writing, duly executed between said companies, were consolidated and united into one corporation under the name of the "Atlanta & Richmond Air Line Railway Company," and from thenceforward became one body corporate, under that corporate name, and the owner of all the property, and entitled to all the

rights, privileges, and franchises which had belonged to the two companies out of which it was formed.

It is further alleged that the Atlanta & Richmond Air Line Railway Company having thus become the owner of all the property which had belonged to the two companies named, and being in need of a large sum of money to complete and equip its road, conveyed to trustees by deed of trust "the entire railway of said company extending from the city of Atlanta, in the State of Georgia, to the city of Charlotte, in North Carolina, together with all its franchises, lands, buildings, machinery, rolling stock, materials, and other property, real and personal, wherever situated, and however held, and whether now owned, or hereafter acquired; and also the annually accruing net income of said company," the purpose of which said deed of trust, and it so declared, was to secure the payment of 4,248 coupon bonds of \$1,000 each to be issued by the company, with interest payable semi-annually at the rate of eight per cent. per annum. It was made the duty of the trustees named in the deed of trust, upon default of payment of either the principal or interest of the bonds, to take possession of the trust property and its revenues, and administer the same, and to sell the property or such part thereof as might be necessary to pay the sum of money in default. The bonds secured by the deed of trust were duly executed and issued, and negotiated by the Atlanta & Richmond Air Line Railway Company.

The bill further states that on the first of January 1874 the company made default in the payment of its interest that day due, that the interest coupons were presented for payment at the office of the company in New York and Atlanta, and payment thereof was refused. More than sixty days having elapsed from the time of such default, the complainants, together with the holders of other 2,342 of said bonds, gave notice to R. A. Lancaster and Alfred Austell, the surviving trustees under said deed of trust, of the default in the payment of interest, and requested them to proceed and execute the trusts created by said deed, and take possession of the trust property, and the revenues of the company as authorized and required by the deed of trust, to sell the property, and apply the net proceeds of the entire trust property to the payment of the principal and interest on the bonds secured by said deed of trust as therein provided. Although five months have elapsed since the said request, the trustees have taken no steps towards the execution of said trusts or the enforcement of the bondholders' rights under the deed of trust, but have utterly failed and neglected so to do.

It is further alleged that the Atlanta & Richmond Air Line Railway Company is managed not so much in the interest of its bondholders and stockholders as in the interests of the Richmond & Danville Railroad Company, whose president is also the president of the Atlanta & Richmond Air Line Railway Company. That it has been made subservient to the interests of the Richmond & Danville Company, greatly to its own injury and the damage of the complainants and other bondholders.

It is also alleged that the Richmond & Danville Railroad Company claims to have some interest in the property covered by the deed of trust, and to have a lien therefore on said property, and that the complainants apprehend the Atlanta & Richmond Air Line Company, and the Danville



& Richmond Company are acting collusively in regard to said lien, and it is their intention to undertake to enforce it to the great wrong and injury of complainants and other bondholders.

It is unnecessary here to notice further the allegations of the bill.

The motion is for the appointment of a receiver, to take possession of the entire line of the defendant company's road, running from Atlanta, Georgia, to Charlotte, North Carolina over portions of three states.

The first question which presents itself for solution is, should there be a receiver for the property of the defendant company or any part of it?

The rules which govern the discretion of courts in the exercise of this power are well settled. Where there is a trust fund in danger of being wasted or misapplied, a court of equity will interfere upon the application of any of the creditors either in his own behalf, or in behalf of himself and the other creditors, and by the appointment of a receiver, or in some other mode grant relief. *Jones v. Dougherty*, 10 Ga. 274. The appointment of a receiver is not necessarily predicated upon the apprehended loss of the debt. It would be sufficient to allege that the trustee appointed refused to perform the trust. *McDougal v. Dougherty*, 11 Ga. 586.

Where there has been negligence or improper conduct on the part of a trustee and the fund is in danger, the appointment of a receiver upon the application of the *cestui que trust* is a matter of right. *Jenkins v. Jenkins*, 1 Paige Ch. Rep. 243.

The rule in courts of equity in regard to appointing a receiver of mortgaged property is, that it will be granted in all cases where the income is required to meet the incumbrance, and is at the present time being so applied as not to be legally applicable to reduce the incumbrance. 2 Redfield on Railways, 363.

To apply these well settled rules to the question in hand. As already stated, the trustees have for more than five months neglected, although requested, and although the deed of trust made it their duty to do so, to take possession of the property of the defendant company. The bondholders have as clear a right to have executed that power of the trust deed which requires the trustees to take possession of the property upon default in payment of interest as any other covenant in the deed. If the trustees refuse to perform this duty, *cestui que trust* have the right to apply to the court to compel them to do it, or appoint some one who will. And this right is independent of any probable deficiency of the trust property to pay the debts secured by the deed of trust. The application for a receiver in such a case is simply a demand by the beneficiaries of the deed that the trust be executed according to its terms.

It has been made to appear upon the hearing that the interest for January and July last is in default, amounting to \$839,840. It is also shown that upon an execution issued on the judgment of a court of the State of Georgia for little more than \$1,000, the railroad of the defendant company has been sold piecemeal in the several counties of the State of Georgia through which it runs. It is also shown that since the filing of the bill and the service of process in this case, and since the allowance of a restraining order, a suit has been instituted in the superior court of Fulton County, Georgia, in which a receiver has been appointed for so much of the property of the defendant company as lies within the State of

Georgia, that suits have been instituted in the United States circuit court for North Carolina, and in the United States circuit court for South Carolina since the service of process in this action, in which receivers have been appointed for the property of the company in these states respectively. It is true that the same person has been appointed receiver in North and South Carolina, but a different person is the receiver appointed by the state court in Georgia. Here are three distinct and independent courts claiming possession of different portions of the railroad and other property of the defendant company, and it is in the actual possession of two independent receivers, living in different states and accountable to different tribunals.

The averment of the bill is that this railroad property from Atlanta, Georgia, to Charlotte, North Carolina, is one inseparable and indivisible piece of property. That it is a portion of a great through route and derives its chief value and business from that fact. The legislation already cited, of the three states through which it runs, shows that it was intended to be one undivided and unbroken line, and the deed of trust, which is the basis of this proceeding, covers the whole line of the road from one terminus to another.

It is obvious that it would be a most unfortunate case that such a property should be held by two different receivers, accountable to three different courts. In fact, when we consider that a large part of the property of the company consists of rolling stock, which must necessarily pass from one end of the road to the other, and which must be used on the three divisions into which the road is divided by its administration in three different courts, it appears to be well nigh impossible to administer the affairs of the road and render accurate and satisfactory accounts. It is evident that such a divided control must result in crippling the operations of the road, destroying its business and reducing its receipts, and placing in jeopardy the security of its creditors.

This unfortunate condition of affairs, resulting from the action of three independent courts, would of itself be, as it appears to us, sufficient ground for the appointment of a receiver for the entire property by this court; if the power and jurisdiction of this court to do so is clear.

Firstly, then, has this court the power to appoint a receiver for real property outside the limits of the state? Involved in this question is another, to wit: Is the Atlanta & Richmond Air Line Railway Company one corporation in Georgia, and another and distinct corporation of the same name in South Carolina, or is it the same corporate body in both states? It seems to me quite clear that the purpose of the legislation of Georgia and South Carolina, in reference to this corporation already set out in this opinion, was to create a single corporate body. Pursuant to the provisions of the acts of these two states, the two original companies did consolidate and combine, they took a new name, and organized a new and single board of directors. Having done this, the new consolidated company, under its new name, and acting by its one president, has executed a single deed of trust covering the entire line of railway from Atlanta to Charlotte, and including all the personal property, which formerly belonged to the two companies which united to form the new one. It is clear that the legislation of the two states was passed to authorize

the making of one corporate body out of two, and that the two corporate bodies so authorized have united, and have, ever since the 20th of June, 1870, the date of the consolidation, been acting as one company.

The only remaining question in this branch of the inquiry is: Could the legislatures of two different states unite to create one corporate body? This question is distinctly answered by the supreme court of the United States in the case of the *Railway Co. v. Harris*, 12 Wall. 82. The court says: "We see no reason why several states cannot, by competent legislation, unite in creating the same corporation, or in combining several preëxisting corporations into a single one.

"The Philadelphia, Wilmington & Baltimore Railroad Company, is one of the latter description. In the case of that company against Maryland, Chief Justice Taney, in delivering the opinion of this court, said: "The plaintiff in error is a corporation composed of several railroad companies which had been previously chartered by the States of Maryland, Delaware, and Pennsylvania, and which, by corresponding laws of the respective states, were united together, and form one corporation under the name and style of the Philadelphia, Wilmington & Baltimore Railroad Company. The road of this corporation extends from Philadelphia to Baltimore." We reach the conclusion then that the Atlanta & Richmond Air Line Railway Company is one and the same corporate body in Georgia and South Carolina, and the legislation of North Carolina hereinbefore referred to shows that it has the same rights and functions in that state that it has in South Carolina.

The bill avers, and the proof shows, that this corporate body, existing in two states and owning property in three, has its residence and principal office at Atlanta, Georgia.

The inquiry then recurs, can this court, having obtained jurisdiction over the person of this corporate body, exercise jurisdiction over its real and personal property outside the limits of the state, by the appointment of a receiver to take possession of the entire property, both within and without the state.

There is precedent for the exercise of such jurisdiction. In *Ellis v. The Boston, Hartford & Erie Railroad Co.* 107 Mass. 1, the court appointed a receiver for the entire line of the defendant company's road, which extended from Boston, in Massachusetts, to Fishkill, in New York.

It is well settled that realty out of the state may be reached by acting on the person. *Mitchell v. Paige*, 2 Paige Ch. R. 606; *Ramsey v. Bradford*, 2 Dess. 587, note. In the case in *Paige* it was held that if the person of the defendant is within its jurisdiction, the court has jurisdiction as to his property situated without such jurisdiction.

When the property is situated outside the territorial jurisdiction of the court, the court may require assignments to be made by the defendant to the receiver. *Chipman v. Sabbaton*, 7 Paige Ch. R. 47; *Cagger v. Howard*, 1 Barb. Ch. R. 369; Story on Conflict of Laws, § 468; *Northern Indiana Railroad Co. v. Michigan Central Railroad Co.* 15 How. 248.

As the property of the defendant company is one entire and indivisible thing, and as it is all covered by one deed of trust, there seems to be no good reason why this court should not appoint a receiver for the whole, even though a part of the property may extend into another state. The

court having jurisdiction of the defendant can compel it to do all in its power to put the receiver in possession of the entire property. If other persons outside the territorial jurisdiction of this court have seized the property of defendant, the receiver may be compelled to ask the assistance of the courts of that jurisdiction to aid him in obtaining possession, but that is no reason why we should hesitate to appoint a receiver for the whole property. We think the courts of other jurisdictions would feel constrained, as a matter of comity, to afford all necessary aid in their power to put the receiver of this court in possession.

Finally, it is objected that the superior court of Fulton County, Georgia, and the United States circuit courts of South Carolina and North Carolina, respectively, have taken jurisdiction of the property of the company within their respective states, and their receivers are in possession, and this court ought not to interfere by the appointment of a receiver of its own.

The record shows that the bill in this case asking this court to undertake the administration of this trust property, and to take possession of it by its receiver, was filed on 30th of October, 1874. It is shown that service was made upon the defendant corporation on the 31st of the same month, and notice of the motion now on hearing was served on the same day.

It further appears that on the 5th of November, upon the application of the complainants, and upon the showing that there appeared to be danger of irreparable injury from delay, a judge of this court directed that, upon the execution of a bond by complainants with sufficient sureties in the sum of five thousand dollars, conditioned according to law, a restraining order issue enjoining and restraining the Atlanta & Richmond Air Line Railway Company, its officers and agents, from handing over or delivering possession of said railway or its appurtenances, or any of its other property, to any person except a receiver appointed by this court in this suit.

The bond was given by the complainants as required by the court, and the restraining order was issued, and on the 9th of November served on the Atlanta & Richmond Air Line Railway Company.

The case in Fulton superior court was not filed until November 10, and no prayer was made for a receiver until Garner, a defendant in that case, applied for one in his answer, which was filed on November 20. The suits in the United States circuit courts of South and North Carolina were not commenced until the 16th of November.

Upon this state of facts, which court first acquired jurisdiction of this trust property?

Is actual seizure of the property necessary to the jurisdiction of the court? In my judgment it is not. In this case I think the jurisdiction of the United States circuit court for the Northern District of Georgia first attached to the property, because the suit in that court was first commenced and service of subpoena made, and because,—

(1.) One of the main objects of the suit was to obtain possession of the property, and such possession was necessary to the full relief prayed by the bill, and

(2.) Because, by the service of the restraining order enjoining the defendant company from delivering possession of the trust property to any

person except a receiver appointed by this court in this cause, the court acquires constructive possession, and from the moment of the service of the restraining order the property was in *gremis legis*. I think these positions are sustained by the authorities.

I subjoin a reference to a number of cases, in all of which the subject under consideration is discussed, and in some of which the precise point is decided and the views above expressed sustained: *Smith v. McIver*, 9 Wheat. 532; *Wallace v. McConnell*, 13 Peters, 151; *Peck v. Jenness*, 7 How. 624; *Williams's Adm'r v. Benedict*, 8 How. 107; *Wiswell v. Sampson*, 14 Ib. 52; *Taylor v. Carroll*, 20 Ib. 583; *Green, Adm'r, v. Creighton*, 23 Ib. 90; *Freeman v. Howe*, 24 Ib. 457; *Chittenden v. Brewster*, 2 Wall. 191; *Memphis v. Dean*, 8 Ib. 64; *Taylor v. Taintor*, 16 Ib. 370; *New Orleans v. Steamship Co.* 20 Ib. 392, 393; *Atlas Bank v. Nahant Bank*, 23 Pick. 489; *Wadleigh v. Veazie*, 3 Sumner, 165; *Ex parte Robinson*, 6 McLean, 355; *Bell v. Ohio Life & Trust Co.* 1 Bissell, 260; *Bell v. The New Albany Banking Co.* 2 Ib. 390; *Ex parte Jenkins & Crosson*, 2 American Law Register, 144; *Parsons v. Lyman*, 5 Blatchford, 170; *Stearns v. Stearns*, 16 Mass. 171; *Connor v. The Mayor*, 25 Barb. 513; *Clepher v. The State*, 4 Texas, 242; *Thompson v. Hill*, 3 Yerger, 167; *Bank v. Rutland Railroad Co.* 28 Vermont, 478; *Merrill v. Lake*, 16 Ohio, 405; *Ex parte Bushnell*, 8 Ohio State, 601; *State v. Yorbro*, 1 Hawks, 78; *Gould v. Hays*, 19 Ala. 448.

Especial attention is called to the cases of *Wiswell v. Sampson*, 14 How. *Chittenden v. Brewster*, 2 Wall. and *Bell v. The New Albany Banking Co.* 2 Bissell, *supra*.

An examination of the cases cited will show that actual seizure of property has not been considered necessary to the jurisdiction of the court in a case where the possession of the property is necessary to the relief sought. The commencement of the action and service of process, or according to some of the cases the simple commencement, of the suit by the filing of the bill, is sufficient to give the court jurisdiction, to the exclusion of all other courts.

In this case not only was the suit begun and process served before the commencement of any other suit, but the defendant railway company was actually enjoined by the order of this court from yielding possession of the trust property to any one except a receiver appointed by this court in this case.

In my judgment this restraining order gave this court constructive possession of the trust property, and a subsequent seizure of the same by any person on the order of any court whatever in a suit subsequently begun was a contempt of the process and jurisdiction of this court.

If this court, upon the bill filed in this case, has the power to take possession of the entire property granted by the trust deed, as we have already decided it has, then the filing of the bill, asking this court to take possession of and administer the trust property, and the service of process, excluded the jurisdiction of all other courts to take possession of and administer the same property or any part thereof.

Other questions than those noticed in this opinion have been argued at the bar, but it is not necessary to decide them in passing on this motion.

I am of opinion that this court has jurisdiction to appoint a receiver for the entire property covered by the trust deed, and to administer the property for the benefit of all persons interested in the trust; that the jurisdiction of this court over the entire trust property attached before that of any other court; that all parties necessary to the hearing of this motion are before the court; that the bill and the evidence submitted establish a proper case for the appointment of a receiver, and the facts brought to the knowledge of the court imperatively demand its intervention: the interest of all parties require that our jurisdiction, being thus exclusive over the subject matter, should be exercised, and that the motion for the appointment of a receiver for the whole trust property should be sustained.\*

In pursuance of the foregoing opinion the court on the 19th of December, 1874, appointed John H. Fisher, Esq., receiver for the entire property covered by the deed of trust executed by the Atlanta & Richmond Air Line Railway Company. Fisher gave bond, as required by the order of the court, but was unable to get possession of that part of the trust property lying in Georgia.

On the 24th of May, 1875, he applied to the United States circuit court from which he received his appointment, then being held by Mr. Circuit Justice Bradley and Mr. District Judge Erskine, for a writ of assistance to enable him to get possession of so much of the trust property as lay within the Northern District of Georgia.

Upon this application the following opinion was delivered.

Messrs. A. T. Akerman & L. E. Bleckley, for the motion.

Messrs. P. L. Mynatt & N. J. Hammond, contra.

BRADLEY, Circuit Justice. This is a bill filed on behalf of first mortgage bondholders of the Atlanta & Richmond Air Line Railway Company, praying for a sale of the railway and appurtenances, and for a receiver to take possession of the property, pending the suit. A receiver (Mr. John H. Fisher) was appointed by Judge Woods, on the 9th of December last. On proceeding to take possession of the property, the receiver found a large and important portion of it, to wit, the depot and terminus in Atlanta, and the railway line in Fulton, and some other counties in Georgia, in the possession of one Lemuel P. Grant, as a receiver appointed by the superior court of Fulton County, a court of the State of Georgia, having equity jurisdiction. Grant refused to surrender possession, and Fisher, under an advisory order of Erskine, District Judge, applied to the superior court of Fulton County, for an order directing its receiver to surrender the property. This application was also refused. Fisher, the receiver appointed by this court, now applies by petition for a writ of assistance, to put him in public possession of the property, and for an attachment as for a contempt against Grant, and other officials, and directors of the railway company, charged to be in complicity with him,

\* Since the foregoing opinion was delivered, Mr. Circuit Judge Drummond, in the case of the *Union Trust Company of New York v. The Rockford, Rock Island & St. Louis Railroad Company*, has reiterated his opinion expressed in *Bell v. The New Albany Banking Co.*, *supra*, holding that where one of the objects of a suit

was to obtain possession of property for administration, the court in which the suit was first commenced by service of process acquired jurisdiction over the property to the exclusion of the court in which a subsequent suit was commenced, but which first actually seized the property.

for conspiring to keep the property out of the possession of the officers of this court. To this petition several answers have been filed by the parties implicated, and the question is thus presented whether this court can, and if it can, whether it will take the property in question out of the possession of a receiver appointed by a state court. Under ordinary circumstances, such a proposition would not be listened to for a moment. But the complainants and the receiver of this court rely on the special circumstances of the case as taking it out of the ordinary rule. Those circumstances may be briefly stated as follows.

The bill in this case was filed October 30, 1874, and a copy and notice of motion for injunction and receiver were served on the railroad company the next day. On the 5th of November, Judge Erskine granted a restraining order, which, on the 9th of the same month, was served on the company, and on Grant, then a director of the company, appointed on behalf of the city council of Atlanta, of which he was a member. On the 11th, it was served on Buford, the president, and on Sage, the general superintendent, and was brought to the notice of Garner, a director. As before stated, the application for a receiver was not decided until the 9th of December, 1874.

Meantime other proceedings had taken place in the state courts, and especially in the superior court of Fulton County, which produced the complications that have arisen.

In December, 1866, one Samuel B. Hoyt, recovered a judgment in the Fulton County court against the Georgia Air Line Railway Company (of which the Atlanta & Richmond Air Line Railway Company is the legal successor by change of name), for the sum of \$1,000 and costs, and a *fiery facias* was duly issued under the laws of Georgia, not only in Fulton County, but Guinnett, Habersham, and Hall counties, and several levies were made on the railroad line, in April, August, and September, 1874, and the road was sold in distinct parcels to one William A. Russell. The sales were severally made in June, September, and October, 1874. On the 5th of November, Russell transferred his interest to Garner, a director as above stated, for the whole line of railroad in Fulton, Guinnett, and Hall counties. Garner was put into possession by the sheriff on the 9th of November, 1874. On the next day, the 10th, the Atlanta & Richmond Air Line Railway Company, by its managing director, P. A. Welford, filed a bill in the superior court of Fulton County against Hoyt, the judgment creditor, Russell, the purchaser at sheriff's sale, Garner, the assignee, &c., to prevent their proceeding to take possession of the road. On the 20th of November, Garner filed a cross-bill in the same court, asking for the appointment of a receiver, which resulted in the appointment of Grant, on the 21st, and his taking possession on the 26th of the same month. Grant had resigned his position as a director of the company on the 11th of November.

It thus appears that the bill in this court was filed before that in the superior court of Fulton County, but that a receiver was first appointed by that court, and that he was in possession when the appointment of receivers was made by this court. It also appears that the object of the two suits was different; in this court it being the foreclosure of the mortgage, and the sale of the property to satisfy the same; the possession sought

being auxiliary to the main purpose; in the state court the object was to set aside the proceedings and sale, under the judgment of Hoyt; and to prevent Garner from keeping possession of the road. On the 2d of January, 1875, the complainants in this court filed an amended bill, making parties of Hoyt, Russell, Garner, and Sage, and alleging, that the proceedings in the superior court of Fulton County were collusive and intended to frustrate the proceedings of this court.

But suppose that the allegations of the amended bill are true, can this court arrest proceedings in a state court, on the ground of their collusiveness? Must not the state court itself be applied to? We cannot assume or entertain the proposition that the state court will not do justice in matters within its jurisdiction. We are bound to suppose that it will not allow a collusive use of its process to be made by parties, but that it will set aside and declare null all such fraudulent proceedings.

Then the question remains pure and simple, does the priority of commencing suit in this court for the foreclosure and sale of the mortgaged premises, give the court constructive possession of the property, so as to nullify the subsequent possession taken by the state court, the respective objects of the two suits being different?

It is too well settled to admit of controversy, that where two courts have concurrent jurisdiction of a subject of controversy, the court which first assumes jurisdiction has it exclusive of the other. But where the objects of the suits are different, this rule does not apply, although the thing about, or in reference to which the litigation is had is the same in both cases. Thus an action of debt on a bond, an action of ejectment on the mortgage given to secure it, and a bill in equity to foreclose the equity of redemption, may be pending at the same time unless prohibited by some statutory regulation. The land mortgaged may be seized in execution by the sheriff in an action at law, even while the ejectment or the bill to foreclose is pending. A bill to foreclose is a personal proceeding, although it has reference to a specific thing. Its object is to put an end to an existing equity, and to procure a sale of the mortgaged premises. Possession may be taken in the course of the proceeding; but until it is taken, can it be said that the property is sacred from the touch of other persons or courts?

The present case, then, is resolved to this. Had the Fulton County court power to appoint a receiver, and place him in charge of the property, whilst a bill to foreclose was pending in this court? or was it an interference with the jurisdiction of this court?

It is perfectly evident that the controversy before that court is a different one from the controversy before this court. There it is a question of the validity of a sale under execution, and of the possession given by the sheriff in pursuance thereof; and that question arises between the Atlanta & Richmond Railway Company and the assignee of the purchaser. Here it is a question of the rights of bondholders, under a mortgage given by the Atlanta & Richmond Air Line Railway Company, and the company, and arising between the bondholders and the company, and its officers and employees.

The controversy not being the same, nor the parties the same, there is no conflict of jurisdiction as to the question or cause. But, inasmuch as



both controversies have ultimate respect to the possession of the railroad of the Atlanta & Richmond Air Line Railway Company, there has arisen a conflict of jurisdiction as to the thing or subject matter. It is important to know, therefore, whether this court had jurisdiction over the subject matter, namely, the railroad, when taken possession of by the receiver of the Fulton County court, so as to make that taking an invasion of the jurisdiction and powers of this court. If it had, it will enforce that jurisdiction and assume the actual possession to which it gives the right. If it had not, then it will not interfere with the actual possession of the receiver of that court, though the rights represented by the litigants in this court be superior to those of both litigants in the state court, as those rights can be asserted when the possession of the state court has ceased. The reason that it will not interfere in such case is, that interference might create a collision between the two courts, which would be unseemly and contrary to the comity which should exist between them. The two courts are coördinate in jurisdiction, neither being superior to the other, and both being charged in the respective cases before them with the due administration of the laws of the State of Georgia.

The test I think is this: Not which action was first commenced, nor which cause of action has priority or superiority, but which court first acquired jurisdiction over the property. If the Fulton County court had the power to take possession when it did so, and did not invade the possession or jurisdiction of this court, its possession will not be interfered with by this court; the parties must either go to that court and pray for the removal of its hand, or having procured an adjudication of their rights in this court, must wait until the action of that court has been brought to a close, and judicial possession has ceased.

Service of process gives jurisdiction over the person. Seizure gives jurisdiction over the property; and until it is seized, no matter when the suit was commenced, the court does not have jurisdiction.

The alleged collusion and fraud of the parties cannot alter the case. It is a question between the two courts; and we must respect the possession and jurisdiction of the sister court. We cannot take the property out of its hands, unless it has first wrongfully taken it out of our hands. This, as we have shown, has not been done. The application for a writ of assistance and for an attachment must be denied.

Our views may be somewhat variant from those of Judge Woods, as expressed by him when the receiver was appointed. That question was different from the one now before us, which relates to the powers of that receiver to interfere with the possession of a portion of the road, in the hands of another receiver. Our decision does not necessarily conflict with his order, although our views may differ from his as to the power of the receiver. And in differing from Judge Woods, we do so with much respect for his opinion. The question must be admitted to be one of some nicety; but we prefer that course which avoids collision with a state court when it coincides with our own convictions as to the law.

The authorities on the subject have been somewhat carefully consulted, especially the following: *Smith v. McIver*, 9 Wheat, 532; *Wallace v. McConnell*, 13 Peters, 151; *Williams v. Benedict*, 8 Howard 111; *Hagan v. Lucas*, 10 Peters, 400; *Payne v. Drew*, 4 East, 523; *Taylor v. Carryl*,

20 Howard, 588; *Pulliam v. Osborne*, 17 Howard, 471; *Buck v. Colbath*, 8 Wall. 384; *Watson v. Jones*, 18 Ib. 715-722.

ERSKINE, District Judge, concurred.

Before the final hearing of the cause the receiver appointed by the United States circuit court succeeded in obtaining possession of so much of the trust property as lay within the State of Georgia without the aid of that court.

On the 29th of October, 1875, during a regular term of the court, the cause came on for final hearing before Woods, J., upon the pleadings, evidence, and report of the master. In the mean time Mr. L. E. Bleckley, who was originally of counsel for complainants, had been appointed a judge of the supreme court of Georgia. His place was supplied by Mr. H. R. McCay. The cause was argued by Messrs. *McCay, A. T. Akerman & O. A. Lochrane* for complainants (with whom appeared Mr. *P. H. Butler* of New York as of counsel), and by Messrs. *H. H. Marshall, John Collier & P. L. Mynatt*, for defendants.

WOODS, Circuit Judge. The substance of the bill having been stated in the opinion given in this case upon the motion for the appointment of a receiver, it is unnecessary here to recapitulate its averments.

The company known as the Atlanta & Richmond Air Line Railway Company, and the same which is made defendant to the bill of complaint, answers the bill and admits the averments thereof as to the legislation of Georgia, South and North Carolina, admits the union of the said "Georgia Air Line Railroad Company," and "the Air Line Railroad Company in South Carolina" under the corporate name of the Atlanta & Richmond Air Line Railway Company, which is the name of this defendant, and that this defendant now possesses, and has since said union possessed, all the property of the said two railroads, extending from Atlanta in Georgia to Charlotte in North Carolina. The railroad company exhibits a copy of what it calls "the agreement of union or consolidation," and prays that it may be taken as a part of its answer.

The answer of the defendant company also admits, that under the name of the Atlanta & Richmond Air Line Railway Company it issued the bonds mentioned in the bill; and to secure the same, principal and interest, executed upon its entire property and line of road, extending from Atlanta to Charlotte, the deed of trust mentioned in the bill of complaint, and a copy of which is appended thereto as an exhibit.

The answer of the defendant company further admits the averments of the bill, to the effect that "said railroad with all its appurtenances is in the nature of an entirety; that it constitutes one and a continuous line of railway from Atlanta to Charlotte; that its unity and continuity are the most important elements of its value, and that to separate it from its appurtenances, or those from it, or any part of it from any other part, would greatly impair the whole."

Answers have been filed to the bill by the trustees, Austell and Lancaster, admitting generally its averments.

An amendment has been filed to the bill, making Samuel B. Hoyt, Wm. A. Russell, B. Y. Sage, and T. S. Garner parties defendants, and making certain allegations and charges against them, which it is unnecessary particularly to state. These new defendants have also answered the bill.

The Richmond & Danville Railroad Company and the United States Security Company were also made defendants, and it was alleged that they claimed to have some lien upon the property of the defendant railroad company, but that the same was inferior to the lien of the complainants. A decree *pro confesso* has been taken against these last named defendants for want of an answer.

At the March term, 1875, of this court, Julius M. Patton was appointed a special master to report among other things the number, character, and description of the outstanding bonds of the defendant, the Atlanta & Richmond Air Line Railway Company, the amount of interest due on the same, the names of the present holders, and description of the bonds held by each.

The master has filed his report, in which he states that 4,248 first mortgage bonds of \$1,000 each were issued and negotiated by the Atlanta & Richmond Air Line Railway Company. He reports that 21 of these bonds are held and owned by the complainants Wilmer and Richard, and 4,095 by other persons, whose names and the number held by each he gives. All these bonds were presented to and counted by the master. On the first day of July, 1875, there was due for interest on the 4,116 so presented to and reported by the master, the sum of \$658,565, not including any interest on the coupons due and unpaid.

This report was filed on the 16th day of August, and has not been excepted to.

The complainants produce the original deed of trust, and the report of the master, and pray for a decree, declaring that by the true construction and intent of said deed of trust the trustees therein named have the right and power, and it is their duty under the facts set forth in the bill, to take possession of the entire trust property and sell the same for the purpose of paying off the principal as well as the interest of the bonds thereby secured, and that they may be compelled to execute said trust accordingly, and according to the directions of the deed of trust, by taking possession of and selling all the property covered thereby, at public outcry, in the city of Atlanta, for the purpose of paying off both the principal and interest of said bonds.

Objection is made to any such decree by the Atlanta & Richmond Air Line Railway Company, and other defendants.

1. It is objected that the decree moved for cannot be made until all the persons entitled to participate in the fund raised from the sale of the property are made parties to the proceedings, and that such persons so interested have not yet been made parties.

The answer to the objection is found in the 84th equity rule, which provides: "Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making them all parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants, in the suit properly before it. But in such case the decree shall be without prejudice to the rights and claims of the absent parties."

This case is the very one provided for by this rule. Here are four thousand bonds payable to bearer, secured by the deed of trust, to enforce

which is the purpose of the suit. Necessarily the parties interested in the fund to be recovered by a sale must be very numerous, and many of them must be unknown. To require all of them to be made actual parties, and in case of the death of any, that the suit should be revived in the name of the personal representative of the deceased party before any final decree could be rendered, would be to deny the bondholders any relief in this court. The course and practice of courts of equity is not so exacting and oppressive. The rule and the general equity practice provides that the case may proceed when the court has sufficient parties before it to represent all the adverse interests of the plaintiffs and defendants.

There is no complaint here that any interest except that of the bondholders who are not parties is not represented.

But the interests of all the bondholders are represented: 1st by those who are actual parties complainant; and 2d by the trustees of the trust deed who are made defendants. The trustees were expressly appointed to represent the bondholders, and if the suit had been brought by them it would not have been necessary to make all the bondholders complainants or defendants. The course is to file the bill in behalf of all who choose to come in as complainants and bear their share of the costs of the suit, or allow them to propound their claims and interest before the master. 2 Redfield on the Law of Railways, 486; 2 Redfield's Am. Railway Cases, 629, 630; *Campbell v. The Railroad Co.* 1 Woods, 368.

This has been the course pursued in this case, and I am clear that all the parties necessary to the decree asked are before the court.

2. The next objection to the decree prayed for is that there can be no sale of the trust property or any part of it, to pay either the principal or interest of the bonds, until the year 1900, when the principal of all the bonds is due.

One of the solicitors for the defendants, however, admits that there may be a decree for interest in default and a sale of so much of the property covered by the deed of trust as is necessary to pay the interest due, but insists that no more can be sold.

The terms of the deed of trust ought to be very clear to justify the court in holding that there could be no sale, even for interest, until the year 1900. Here are bonds to the amount of \$4,248,000 bearing eight per cent. interest, payable semi-annually, and due as to principal in thirty years. The property covered by the deed of trust to secure these bonds is not estimated to have cost over \$7,000,000. If no interest were paid until the maturity of the bonds, the principal and interest would then amount to over \$20,000,000, calculating interest on the coupons as they matured. For this vast sum the bondholders would have a security on property which only cost \$7,000,000. In the mean time, during nearly the life of a generation, the railway company would hold the money of the bondholders, and, although it had agreed to pay interest semi-annually, could refuse to comply with its contract, and the bondholder would be without any effectual remedy. I do not believe there is a railroad company so bold, as to ask a loan of money on a deed of trust which could bear such a construction, or a capitalist so foolish as to grant the loan.

There are certain expressions in the deed of trust which give some faint color to the theory under consideration, but there are other clauses which indicate a contrary purpose most unmistakably.

The trust deed declares explicitly that "should default be at any time made in the payment of any part either of the accruing interest or of the principal sum secured to be paid by any bond or bonds issued under the authority aforesaid," the trustees shall take possession of the property mentioned in the deed of trust and proceed to sell the same on public auction in the city of Atlanta, and shall apply the net proceeds of the sale in the payment of the interest due on the bonds, and to the extinguishment of the principal of such of the bonds as may then be due. It seems to me that this provision of the trust deed completely overturns the idea that there can be no proceeding for a sale of the trust property or any part of it until the maturity of the principal of the bonds.

One of the solicitors of defendant, while not agreeing with the construction of that deed just noticed, insists that until the bonds mature there can only be a sale of so much of the trust property as may be necessary to discharge the interest due and unpaid. But in the view I take of the case it is unnecessary to pass upon this dispute. It is clear to my mind, and it is conceded by one of the solicitors for defendants, that there may be a sale of trust property sufficient to satisfy the interest due and unpaid.

On the other hand, complainants insist that a default in the payment of interest makes both principal and interest due, and that the court should order a sale for the whole amount of both principal and interest. Without going into a critical examination of the language of the deed of trust, I content myself with saying that it seems very clear that when the interest is in arrear the trustees may sell the entire trust property. The trust deed seems to contemplate but one sale, and on such sale a full and complete settlement of the trust.

Conceding then that there must be a sale to pay the interest due and unpaid, the question arises should there be a sale of the entire trust property, or only a part of it.

I think this question is settled by the averment of the bill admitted by the answer of the defendant railroad company, and nowhere in the pleadings denied, that the railroad and its appurtenances is in the nature of an entirety and constitutes one and a continuous line, and that its unity and continuity are the most important elements of its value, and that to separate any part from any other part would greatly impair the whole.

This averment of the bill is not only admitted by the answer of the defendant company, but there is not a scrap of evidence in the record to show that it is not entirely true.

And, as a general rule, it must be evident that to cut up a railroad and sell it by piecemeal would destroy its value. While a sale of a particular part might be made in some cases without serious detriment to the part sold, yet from that fact it would by no means follow that the residue would remain uninjured.

That where a mortgage or deed of trust is given to secure the interest and principal of notes or bonds, and the mortgaged property cannot be sold in parts without injury to its value, the whole may be sold on default of the payment of interest before the principal is due, is sustained by the following authorities: *Sulman v. Claggett*, Bland's Chancery Reports, 179, and other cases there cited; 3 Powell on Mortgages, 965; *Seaton v. Twyford*, Law Reports, vol. 11, 591; *Dunham v. Railway Company*, 1 Wall.

254; *Olcott v. Bynum*, 17 Ib. 44; *Pope v. Durant*, 26 Iowa, 238; *Ex parte Fisher*, 1 Maddox, 159.

Upon the case as presented, I am therefore of opinion, if any part of the road is sold, the whole may and should be sold.

If a sale of the whole is made, it will be then time to consider what shall be done with the proceeds. That is a question which, it seems to me, does not, under the practice of courts of equity, present any grave difficulty.

It is objected to a sale of the whole property of the defendant railroad company, that the property is owned by two distinct corporations, and one of which, a resident of South Carolina, owns the property of the railroad in that state; that there can be no merger of railroad corporations extending through several states which will so destroy their individuality as to confer on the united corporation all the franchises of the several parts; that a corporation cannot be chartered by two states so as to have a common individuality in both.

The inference drawn from this proposition is, that this court can only order a sale of the railroad property in Georgia which is owned by the Georgia corporation, which alone is a party defendant to the bill, and that the court cannot order a sale of the property in South Carolina, which is owned by a distinct corporation which is not before the court.

It would seem to be a sufficient reply to this proposition to say that the Atlanta & Richmond Air Line Company has answered, admitting the union and consolidation of the two companies into one company, has contracted as one and not as two companies, has issued bonds and secured them by a deed of trust as one company covering its entire line of road and property, and has agreed that the whole might be sold by one sale, at Atlanta, in the State of Georgia. Even if this proposition of defendants' solicitor were true, we think the facts would estop the South Carolina company from setting up its separate existence and separate property, and we think that it has, by the answer of the Atlanta & Richmond Air Line Company, entered its appearance in this cause.

But is it true that a corporation cannot be chartered by two states so as to make one and the same corporate body?

When this case was up on motion for the appointment of a receiver, I passed upon this question, and held that two states might by concurrent legislation unite in creating the same corporate body. It is unnecessary to repeat what I then said. See *Railroad Co. v. Maryland*, 10 How. 392; *Railroad Co. v. Harris*, 12 Wall. 92.

Counsel for defendants refer to the following cases as establishing the doctrine upon which they rely: *Ohio & Mississippi Railroad Co. v. Wheeler*, 1 Black, 286; *Marshall v. Baltimore & Ohio Railroad Co.* 16 How. 325; *Railway Co. v. Whitten*, 13 Wall. 270; *Tomlinson v. Branch*, 15 Ib. 460; *Railroad Company v. Jackson*, 7 Ib. 262; *The Delaware Railroad Tax*, 18 Ib. 206.

I have examined these cases and cannot find in them anything to overturn the positive declaration of the court in *The Railroad Co. v. Harris*, *supra*. On the contrary, *The Delaware Railroad Tax case*, *supra*, strengthens the view of the court in that case.

I am of opinion, therefore, that the Atlanta & Richmond Air Line Rail-

way Company is one and the same corporation both in Georgia and South Carolina, and that this one corporation is properly before the court.

But concede that there are two corporations under the name of the Atlanta & Richmond Air Line Railway Company, one created by and residing in Georgia and the other created by and residing in South Carolina. It is made perfectly clear by the pleadings and evidence that these two corporations, if there be two, have joined under their common name in executing the bonds and deed of trust in the bill mentioned, over the common property of the two corporations. Now the Georgia corporation has been served with process and is before the court, and the South Carolina corporation has entered its appearance, and both the corporations have united in a common answer to the bill. The court therefore has jurisdiction over both; for while the South Carolina corporation, if it exists as a distinct corporate body, has the right to demand that it shall be sued only in the district where it resides or is found, it may waive this right and enter its appearance as a defendant in any district it please. *Northern Indiana Railroad Co. v. Central Railroad Co.* 15 How. 242. It has appeared in this court in this cause as a defendant, and it therefore may be bound by its decree.

It is further insisted by the defendants' counsel that as a large part of the property covered by the deed of trust is beyond the territorial jurisdiction of this court we are without power to order the sale.

The paper executed by the Atlanta & Richmond Air Line Railway Company is a deed of trust to trustees, conveying to them all the railway and other property of the company, with power to sell the whole at the city of Atlanta, in the State of Georgia, if default should be made in payment of interest or principal. Now it cannot be seriously contended that these trustees could not without the aid of this court, by following the direction of the deed of trust, have sold the entire line of the defendant company's road and have conveyed a good title to the whole, extending as it does from Atlanta to Charlotte. Is the power of the trustees any less because this court has been asked to construe the deed of trust and to order them to execute the trust? If the trustees under the direction of this court sell the whole road, they do so by virtue of the power vested in them by the deed of trust. We are not asked to foreclose a mortgage. We are not asked to confer on the trustees any power which they do not already possess, by virtue of the deed of trust, or to impose upon them any new duties, but simply to tell them what their powers are under their deed, and require them to exercise their powers for the benefit of the *cestuis que trust*.

I think what has just been said is an answer to the argument that under the Code of Georgia a mortgage can only be foreclosed when the entire principal or an instalment of it is due. No foreclosure is asked here. The complainants seek only to exercise what they think to be their rights under the deed of trust, by a sale according to the terms of the trust deed.

The conclusions I have reached are the following:—

1. That the Atlanta & Richmond Air Line Railway Company, whether it is a single corporation or two corporations of that name, is properly before this court.

2. That it is the meaning of the deed of trust, that the road of the company, or so much as may be necessary, may be sold to pay interest coupons due and unpaid without waiting for the maturity of the bonds.

3. That the road is an entirety and cannot be sold piecemeal without injury to the value of the road, and therefore the entire road may and should be sold.

4. That the trustees, by virtue of their power under the deed of trust, can, by the direction of this court, sell the entire road lying in three states and convey a good title to the whole.

5. That the trustees ought to be required to make the sale in accordance with the directions of the deed of trust.

6. When the proceeds of the sale are brought into the court, the court will direct how the residue, remaining after the payment of the interest due, shall be disposed of.

In accordance with the foregoing opinion a decree was made by which there was a finding of the amount of interest due and unpaid, and the trustees were ordered to sell at Atlanta, Georgia, in the manner, and after the notice prescribed by the trust deed, the entire line of the defendant company's road, extending from Atlanta to Charlotte, North Carolina.

The Atlanta & Richmond Air Line Railway Company prayed an appeal from this decree to the supreme court of the United States, which was allowed, and the penalty of the appeal bond was fixed at \$800,000. This sum was arrived at as follows: It was made to appear that the property conveyed by the deed of trust would not probably sell for more than the principal and interest owing upon the bonds at the date of the decree, and that the cause would remain pending in the supreme court at least two years before final hearing, and that the interest which would accrue upon the bonds during that time would amount to a little more than \$798,000. Under rule 32 of the United States supreme court, 6 Wall. the penalty of the bond was therefore fixed at \$800,000, and it was ordered that upon the execution by the appellant of a bond in that sum, with sureties to be approved by the clerk, the appeal should supersede the execution of the decree.



## SUPREME COURT OF WISCONSIN.

[NOVEMBER, 1875.]

PAROL CONTRACT OF SALE OF REAL ESTATE. — STATUTE OF FRAUDS. —  
ESCROW. — ESTOPPEL.

## CAMPBELL v. THOMAS.

A parol contract for the sale of real estate, however specific, cannot be enforced.

A parol contract was made whereby B agreed to sell A certain real estate at a certain price, a part of which was paid at the time of the agreement, and executed a deed which was placed in the custody of B's attorney to be surrendered to A upon the execution and delivery, upon a day certain, of notes and a mortgage to secure their payment. A duly executed the notes and mortgage, delivered them to B's attorney, and demanded the deed, which was refused. *Held*: that, under the statute of frauds, the contract to deliver the deed could not be enforced; that the deed was not an escrow, and that B was not estopped to deny the validity of the contract.

*Thomas v. Sowards*, 25 Wisc. 631, modified.

THE case stated most favorably to the plaintiff was briefly as follows: The plaintiff and the appellant, Thomas, entered into a parol agreement for the sale by the latter to the former of certain land, at a stipulated price, to be secured and paid as hereinafter mentioned. In accordance with such parol agreement, the plaintiff paid the appellant a small sum on account of the purchase money, and the latter signed, sealed, and duly acknowledged a deed of the premises to the plaintiff, the deed being in the usual form of a warranty deed, and delivered the same to Judge Hand, his co-defendant, with directions to deliver it to the plaintiff, if the latter should, two days later, deposit with Hand his notes for a certain sum, part of the price of the land, and a mortgage executed by him on the same land to secure the payment of such notes, and at the same time pay to Hand, for the use of the appellant, the balance of the agreed price. These proceedings were all in accordance with the parol agreement aforesaid.

At the appointed time the plaintiff deposited with Hand the notes, mortgage, and money as agreed, and demanded the deed of the land; but, acting in obedience to instructions from the appellant, Hand refused to deliver the deed. At the same time the appellant tendered to the plaintiff the money which the latter paid him when the verbal agreement was made, and, on the refusal of the plaintiff to receive it, left the same with Hand for the plaintiff.

The action was brought to compel Hand to deliver to the plaintiff the deed deposited with him by the appellant. The circuit court gave judgment for the plaintiff, that the defendant Hand deliver such deed to him, and that the appellant pay the costs of the action.

*Van Buskirk & Ritchie*, for appellant.

*Fash & Lee*, for respondent.

LYON, J. If the deed deposited by Thomas with Judge Hand was an escrow, we have no doubt the conditions upon which the same was to be delivered to the plaintiff, who was the grantee named therein, might lawfully rest in parol and be proved by parol.

Was the instrument *an escrow*? If Thomas, notwithstanding the deposit, retained control of it, it was not; and he might lawfully reclaim or prevent a delivery of it to the plaintiff. See *Pruteman v. Baker*, 30 Wis. 644, and cases cited.

It is very clear that unless there was a valid contract between Thomas and the plaintiff for the sale and purchase of the land described in the deed deposited with Judge Hand, such deposit was the mere voluntary act of Thomas, which in no manner interfered with or affected his control of the instrument. *Fitch v. Bunch*, 30 Cal. 208. Hence, the controlling question to be determined is, did Thomas and the plaintiff make a valid contract for the sale and purchase of the land?

They agreed verbally — the plaintiff to purchase and Thomas to sell — on certain terms, which included the execution of a mortgage on the land by the plaintiff to secure the payment of a portion of the purchase money. But such verbal agreement was a nullity, by the statute of frauds, there having been no such part performance of the agreement as would take it out of the statute. There was no valid contract unless the same, or some notes or memorandum thereof, expressing the consideration, was in writing, and subscribed by Thomas. R. S. ch. 106, sec. 8. The only writing subscribed by Thomas, which relates to any such contract, is the deed he deposited with Judge Hand. That instrument expresses a consideration, and if it contained the whole contract we should have no difficulty in holding that it answered the requirement of the statute. But the difficulty is that the deed does not contain the whole contract. It is essential to the plaintiff's case to maintain, and he does maintain, that he was to give Thomas his notes for a portion of the purchase money, and was to execute his mortgage on the land in controversy to secure the same. No note or memorandum in writing of this portion of the agreement was made, and the same still rests in parol.

The contract expressed in the deed deposited with Judge Hand is a contract to sell and convey the land — the whole title thereto, absolutely, and without any reservation whatever — to the plaintiff, for a specified sum of money. But proof of such a contract is not sufficient to entitle the plaintiff to judgment. His right of action depends upon proving that Thomas was to retain a mortgage interest in the land as security for part of the purchase money. Had the mortgage been drawn and signed by the plaintiff at the same time the deed was signed by Thomas, and deposited with the deed, it would probably have been a sufficient compliance with the statute. By a familiar rule of law the two instruments would, in such cases, be construed together as constituting a single contract. But the mortgage was not then drawn and signed, and a most material portion of the verbal agreement — that portion upon which the plaintiff's right of action depends — was suffered to remain in parol.

It necessarily follows that there was no valid contract between the plaintiff and Thomas for the purchase and sale of the land; that the deed deposited with Judge Hand was not *an escrow*, but remained under the control of Thomas; and that Judge Hand properly refused to deliver it to the plaintiff, after such delivery had been forbidden by Thomas.

This case, in principle, is much like that of *Thomas v. Sowards*, 25 Wis. 631, which was sharply criticised by the learned counsel for the

plaintiff. We think that case was correctly decided. There is, however, language in the opinion which seems to assert the doctrine that although the whole of a parol contract for the sale of lands is stated in a deed of such lands, made pursuant to the contract and delivered as an *escrow*, such contract is nevertheless void; if otherwise, it remains in parol. We think that doctrine is erroneous.

*Thayer v. Luce & Fuller*, 22 Ohio St. 62, is an instructive case on this subject, and sustains the view above expressed. Thayer and Fuller signed an imperfect memorandum of a contract for the sale by Thayer to Fuller of certain land. The memorandum was defective in that it contained no description or designation whatever of the land affected by the contract. At the same time Thayer signed and acknowledged an instrument in writing purporting to be a conveyance to Fuller of the land which he had in fact agreed to convey to him, and presented the instrument to Fuller for his approval of its terms and of the description of the land. Fuller orally assented to and approved the instrument, and returned it to Thayer, in whose hands it remained. The action was, to compel Thayer specifically to perform his contract to sell and convey the land to Luce and Fuller (who were jointly interested therein), and specific performance was decreed.

The defence of Thayer was that the alleged contract was void under the statute of frauds. It was held that the memorandum alone was not sufficient (because of such defect) to prove a valid contract of sale; but that the defect therein was supplied by the deed, the law being that the two instruments should be construed together. The court says that the passing of the deed to Fuller for his approval showed an intention by Thayer to make a proposition to sell Fuller the land therein described on the terms therein written, and it proceeds to say that this "is a legitimate and proper way to negotiate a contract of sale," and that "the terms there proposed are instantly accepted; the contract of bargain and sale is complete, not executed in fact by transfer of title, but executory, and evidenced by writing signed by the vendee within the meaning of the statute. Now, does it matter in whose possession the instrument may afterwards be placed? The executory contract is subsisting, and will continue to be valid and binding upon the parties until mutually rescinded or consummated. Such is the case under consideration. The deed was signed by the defendant below, and delivered to the plaintiff, not as a conveyance of title, but as evidence of their executory contract of bargain and sale." It is further held that a parol acceptance by Fuller of the terms of the deed was sufficient.

In the present case it is unnecessary to say whether we would, in a like case, fully indorse the doctrine laid down by the supreme court of Ohio in *Thayer v. Luce & Fuller*. We so far adopt it here as to hold that if a person who has made a parol agreement to sell land, sign an instrument in the form of a conveyance of such land to the vendee, and deposit it in *escrow*, if such instrument contains the terms of the parol agreement, including the consideration, it is a sufficient compliance with the requirements of the statute of frauds.

We deemed it our duty to make the above comments upon the case of *Thomas v. Sowards*, not because they are essential to the determination

of the case, but to correct erroneous doctrine which seems to have there received the sanction of this court, although it did not control or affect the decision of the case before it.

We may properly conclude with a few general observations on the main question involved in the present case. The authorities cited on behalf of the plaintiff, and numerous other authorities on the subject of *escrow*, have been carefully examined, and we fail to find a case which conflicts with the foregoing views, or with the real decision of the court in *Thomas v. Sowards*. On the contrary, in *Thayer v. Luce & Fuller*, *supra*, the court said: "The statute requires written evidence of the agreement to the extent of charging the defendant." It may be argued that because the case was not one where a deed was deposited *in escrow*, it has no application here. But the court seems to have there decided a general principle, applicable to a case like this, as well as to the case before it.

*Stanton v. Miller*, 58 N. Y. 192, is much relied on by counsel for the plaintiff. There the whole contract affecting the land and the condition (or the contingency upon which the depositary of the deed was to deliver it to the grantees named therein) were in writing, signed by the grantor. Such condition or contingency is there expressed in one of the writings: "The said deed is delivered to O. M. Benedict, of Rochester, *in escrow*, for the use of the grantees at my decease, and not deliverable to them before that time." At the time of depositing the deed with Benedict the grantor was advised that she might recall it at her option. Subsequently she directed Benedict not to deliver, but to destroy it. The instrument not having been destroyed, after the death of the grantor, an action was brought to compel delivery thereof to such grantees. The court denied the relief prayed, on the ground that the written contract was uncertain in respect to the parties to whom the conveyance was to be made. That is to say, it was held that the grantor did not contract to convey to the grantees named in the deed, and hence that she might lawfully control the instrument after it was deposited with Benedict. The contract provided for a conveyance of some kind to the father of the persons named as grantees in the deed and his family, or to such members thereof as the grantee might choose. The court says: "The making of a deed *in escrow* presupposes a contract pursuant to which the deposit is made;" and because the grantees named in the instrument deposited with Benedict could not show a valid contract with the grantor that she should convey the land to them, the court refused to adjudge delivery of the deed after the grantor had directed that no delivery thereof should be made. The fact that the grantor elected, a few days after the original contract was made, to whom she would convey the land described therein, failed to save the plaintiff's case.

We perceive no ground on which this plaintiff's right of action can be sustained unless it be held that, after having signed, acknowledged, and deposited the deed as before stated, Thomas is estopped to deny that he made a valid contract with the plaintiff to sell and convey to the latter the land therein described, and retain a mortgage interest as security for a portion of the purchase money therefor. We are not aware of any principle of law which will authorize an application of the doctrine of estoppel

to such a case. Our conclusion is, that the judgment of the circuit court must be reversed and the case remanded, with directions to that court to dismiss the complaint.

### SUPREME COURT OF MAINE.

(To appear in 64 Me.)

#### MALPRACTICE. — IMPLICATIONS WHERE PHYSICIAN CONTRACTS TO ATTEND PATIENT. — RIGHTS AND DUTIES OF PHYSICIAN.

##### BALLOU v. PRESCOTT.

Though the language used and the effect of it are questions of fact for the jury, in controversies relating to a contract by parol, yet it is also true that in many cases the law will infer a definite, though perhaps implied contract, from certain admitted facts. At least it will infer certain elements as belonging to particular contracts, or impose specific duties in connection with, and growing out of special undertakings, although these are entered into by parol.

Especially is this true of contracts growing out of an employment *quasi* public in its nature, like that of a professional man.

Thus, the care and skill which a professional man guarantees to his employer are elements of the contract into which he enters by accepting a proffered engagement. So, continued attention to the undertaking, so long as attention is required, in the absence of any stipulation to the contrary, is equally an inference of the law.

While it is competent for a physician and his patient to enter into such a contract as they think fit, limiting the attendance to a longer or shorter period, or to a single visit, if they please; and while, if there be no such limitation, the physician can discontinue his attendance at his election, after giving reasonable notice of his intention to do so; yet, if he be sent for at the time of an injury by one whose family physician he has been for years, the effect of his responding to the call will be an engagement to attend to the case, so long as it requires attention, unless he gives notice to the contrary, or is discharged by the patient; and he is bound to use ordinary care and skill, not only in his attendance, but in determining when it may be safely and properly discontinued.

If a surgeon, called to attend one who has long been his employer, leaves his patient before he has been properly cared for professionally, or while he needs further attention, and relies upon an alleged discharge by the patient as a defence to a suit brought for the abandonment, this being a new substantive matter of defence, the burden of proving it is upon the defendant.

**ON EXCEPTIONS.** Case against a physician, or surgeon, for malpractice in treating the plaintiff for an injury to his left leg, received May 20, 1870.

The plaintiff testified that Dr. Prescott had been the family physician for many years, and that he was sent for and arrived within an hour of the time when the injury was received; made an examination of the limb, said nothing about calling again, and never did call afterward, nor was he ever sent for again. Dr. Prescott stated, on the contrary, that as he was about leaving he said: "Ballou, shall I call and visit you any more?" that the reply was: "I will leave it to you;" and the doctor testified, "I guess my answer was, 'Oh, no.' Then I think some words passed, and to wind up I said something like this: 'Then I shall not visit,' or, 'I shall not visit you any more unless you call for me,' and left him immediately."

Mary E. Traak, summoned by the defendant, was present when the wound was dressed, and "heard the doctor say, when he left, that if he was needed again, to send for him." She did not hear Mr. Ballou say anything. *Per contra*, Charles A. Sanderson, also present all the time, did not hear aught said about coming again, or being sent for; and did not think anything was said about it.

This was the substance of all the testimony upon this particular branch of the case to which the exceptions apply. The jury gave the plaintiff a verdict for four hundred and fifty dollars. The defendant moved to set it aside as against law and evidence, which motion was overruled. He also excepted to the charge of the judge in the following particulars:—

The defendant's counsel requested the court to instruct the jury as follows: "That if defendant was to attend plaintiff during his illness or lameness and did not attend, and that was known to plaintiff; and ordinary care on his part required him to send for defendant again, or employ another surgeon to treat him, it was his duty to do so, and for such damages as resulted from such neglect defendant would not be liable." This instruction was given qualifiedly, thus:—

"I believe I have given that. I have already stated to you, as you understand, if he was misled by any directions, or any want of directions, which it was his duty to give, why, it is not for the defendant to complain of that. But if he did not go to him, not exercising the ordinary care, such as I have described, without being misled by the defendant's directions, and he neglected to do what he ought to have done in the way of sending for this man, or another surgeon, why, of course, whatever damage happened from that want of ordinary care, or from that neglect on the part of the plaintiff, he could not recover for."

Before this request was made and answered as aforesaid, the judge had instructed the jury, in a manner not excepted to, as to the necessity for reasonable professional skill in the physician, and the exercise of it and of ordinary care in the actual treatment of that particular case; and that if such skill was possessed and such care exercised, then in those respects the defendant would be exonerated from liability. He then further remarked:—

"If he did not, why then he would be liable for that dereliction of duty. But there is one other question presented in connection with this, to which it is necessary that I should call your attention. It is said, on the one hand, that his duty ended with that first visit, and that he is not in fault for what happened subsequently to that. On the other hand, it is claimed that his duties continued. Here is a question of fact as well as of law. In regard to the law upon this matter, I apprehend there is no doubt about it. When a physician or surgeon is called upon to attend a patient, it is perfectly competent for the parties to make just such a contract as they see fit, and in accordance with this view, I understand it is sometimes a practice among certain physicians and surgeons to make a contract to attend upon certain families of persons, and specifying a time or by the year, whatever may be their sickness, longer or shorter, to do whatever duties may be required of them during the year. So it is competent for them to make a contract regulating their attendance for a single sickness, longer or shorter, and it is competent after they have

made a contract, if one is made at all, for the parties to rescind it. Here, I understand the surgeon was called in the usual way, and nothing said about the time during which he was to attend, and he went in obedience to that call. If nothing more was said, and nothing more was done, the law would require him to give such attention as the case or the patient required. If this injury required that degree of treatment which it was proper to be rendered him, be it longer or shorter, and if nothing was said about the time, it was competent for either party to rescind that contract any time they saw fit. It was perfectly competent for the patient to discharge his physician or surgeon, and it was just as competent for the physician or surgeon to discharge his patient. The privileges are mutual; their rights are mutual; the same rights each have. But supposing the patient was in a condition that required longer treatment. It would not be proper — it would not be legal — the defendant would not have a right to say nothing to that patient, and go off and abandon him in that condition, when he required further treatment, when he had not been discharged, and when he himself had not discharged his patient. In order to do that, it would be necessary for him either to continue his treatment until he is discharged, or to give his patient notice, and sufficient notice to enable him to procure other proper medical attendance. There are many cases where it would be exceedingly critical and dangerous for a physician at once to leave a patient. The law does not authorize him to do that, his patient being in that critical and dangerous condition. But so long as his attendance and treatment are required, so long he must do it, unless he himself chooses to discharge his patient by giving him the proper notice that he will not attend further."

The judge then presented the issue of fact to the jury as to the manner of Dr. Prescott's leaving Mr. Ballou, and whether or not anything was said about his coming again or being sent for; remarking that it was perfectly competent for the parties to make any such arrangements of these matters as pleased them; and submitting to the jury what, if any, were made in this instance; and then proceeded to instruct thus, in case nothing was found to have been said by Dr. Prescott when leaving: —

"I understand it to be the duty of a surgeon, when he is called upon to attend, to exercise his own judgment, in the absence of any agreement, or discharge on the part of the patient, or with the patient — that he should exercise his own judgment as to the propriety of coming again, and in exercising that judgment, he is to exercise the same degree of skill or knowledge of the accident or disease which he is attending, and the same degree of care which he should exercise in its treatment.

"Now if he informed this plaintiff, that from the nature of the injury it was unnecessary for him to come again, unless some new developments took place, why then a question arises whether, in the formation of that judgment, he exercised this ordinary care and skill to which I have called your attention, upon the main question. If he did, why then, although he might have been mistaken, he would not be liable for any bad results which might follow from it, any more than from any mistake in judgment which he might exercise in the treatment of the injury itself; the same rule, precisely, would apply. And if that was the true state of things, why then you will inquire and see whether it was so or not, and inquire,

of course, whether he did exercise that degree of skill and care in forming that judgment which is required in the treatment of the disease.

"And this, also, would have a bearing upon his duty, as to further attendance. If he did form that judgment, and so notified the plaintiff, why then he would have no occasion for attending further; that is, if in this exercising of all due care and skill he had come to that conclusion, and so informed the plaintiff, why then his duties would cease at that time.

"These, gentlemen, I believe, so far as they occur to me, are all the principles of law which are applicable to the duties. In regard to this discharge to which I am requested to call your attention, it should be proved, and you will perceive from the instructions, I think, that I have already given you, that if there was nothing said about that, the burden of proof would be upon the defendant, to show that his duties had ceased then, unless you are satisfied, that in the exercise of a sound judgment, that degree of judgment which is required, he gave notice that his attendance (or substantially to that effect) would not be longer needed, with the request that he should be notified if he was required, if any further development should take place. So far as the discharge alone is concerned the burden of proof would be upon the defendant, to show that he was discharged; because he assumes the affirmative there, and says that he was discharged."

The judge then gave unexceptionable instructions upon the question of damages, and concluded the charge by reading Mr. Libbey's above mentioned request and then modifying it, as hereinbefore shown.

*A. Libbey* for the defendant. The contract between the parties was proved by parol, and it was a question of fact for the jury to determine what the contract was. This proposition is so well settled it is unnecessary to cite authority. The court could not, as a matter of law, determine what the contract was from this evidence. It was for the jury to find whether the contract was for one visit only, or for taking charge of the plaintiff so long as he needed surgical or medical treatment. To constitute a contract between the parties they must have understood it alike, and assented to its terms and conditions. In determining the question, the jury should consider all the circumstances of the case, as well as the evidence given by the witnesses. They should consider the nature of the plaintiff's injury; what it was understood to be at the time by the plaintiff and by defendant; the skill and place of residence of the defendant as understood by the plaintiff, and whether either or both of the parties understood that one visit only was required by the plaintiff's condition.

It might be that the person called to attend in such a case was understood as not possessing sufficient skill as a surgeon to treat the case, and was merely called in the emergency, to care for the person injured till competent aid could be procured. It might be that the family physician was away from home, and another was called to attend till the family physician returned, and that from a knowledge of the circumstances both parties so understood it, though nothing was said. It might be that a very skilful surgeon was called from a great distance at large expense, and from the circumstances both parties understood it was for one visit only though nothing was said about it.

These illustrations are used to show that the court cannot assume, as



matter of law, from the fact that a surgeon or physician is called to a person injured or sick, that the contract between the parties is for one visit or more than one.

The substance of the instruction to the jury was that the defendant was called in the usual way, and was bound to attend the plaintiff so long as he needed treatment, unless the contract was terminated in the manner specified in the charge; and that the burden of proof was on the defendant to show that the contract was thus terminated. The jury should have been instructed that the defendant undertook to treat him so long as his injuries required treatment; and on this point they should consider the fact that the defendant was called, and all that took place between the parties, if anything, in regard to it, at the first visit, and the surrounding circumstances.

The rule given to the jury required the defendant to prove affirmatively that he was discharged by the plaintiff, or discharged his patient by giving him reasonable notice that he should cease to attend him; or that, in the exercise of due skill and discretion, he determined that the plaintiff needed no further attendance and notified the plaintiff of the fact. This I submit is error.

The action is case for want of skill or negligence on the part of the defendant, in treating and taking care of the plaintiff. The burden of proof is on the plaintiff throughout the whole case to show want of skill or negligence. If he relies on the fact that the defendant made one visit only, and was guilty of negligence in not continuing his treatment, the burden is on the plaintiff to show that the defendant undertook to treat him as long as he needed treatment, and that he needed further treatment; that in the exercise of due skill and care the defendant would have known he required further treatment, and did not continue it, by reason of which the plaintiff was damaged. In an action of tort for negligence, the burden of proof is on the plaintiff to show negligence throughout the whole case on every point involving due care.

*Joseph & Orville D. Baker*, for the plaintiff.

DANFORTH, J. This is an action against the defendant as a surgeon for alleged malpractice, and one of the causes of complaint set out in the writ is that he abandoned his patient while still needing medical attention. The exceptions raise the question as to the nature of the contract between the surgeon and his patient.

Upon this point the jury were instructed as follows: "Here I understand the surgeon was called in the usual way, nothing said about the time during which he was to attend, and he went in obedience to that call. If nothing more were said or done, the law would require him to give such attention as the case or patient required." It is suggested that, by this ruling, that which was really a question of fact for the jury was decided as a question of law; or, in other words, whatever contract existed between the parties, being verbal, it was the province of the jury to settle its terms. As a general proposition this is undoubtedly true; but it is equally true that in many cases, from certain admitted facts, the law will infer a definite contract, implied perhaps but none the less distinct and certain. Much more will it infer certain elements as belonging to particular contracts, or impose specific duties in connection with and

growing out of special undertakings. Especially is this true of all that class of cases in which the contract grows out of an employment, in a greater or less degree public in its nature. All professional business partakes somewhat of this character. The care and skill which a professional man guarantees to his employer are elements of the contract to which he becomes a party on accepting a proffered engagement. They are implied by the law as resulting from that engagement, though it be but verbal, and nothing said in relation to such elements. So continued attention to the undertaking, so long as attention is required, in the absence of any stipulation to the contrary, is equally an inference of the law. If a counsellor at law undertakes the management of a cause, nothing more being said or done than simply an offer and acceptance of a retainer for that purpose, it will hardly be denied that an abandonment of the cause before its close would be as much a violation of the contract with the client as a neglect to use the requisite care and skill in its prosecution, and the duty of continued attention is equally an implication of the law as that of exercising the required care and skill.

That the same principles apply to the employment of a physician or surgeon there can be no doubt. If he is called to attend in the usual manner, and undertakes to do so by word or act, nothing being said or done to modify this undertaking, it is quite clear as a legal proposition that not only reasonable care and skill should be exercised, but also continued attention so long as the condition of the patient might require it, in the exercise of an honest and properly educated judgment; and certainly any culpable negligence in this respect would render him liable in an action. *Barbour v. Martin*, 62 Maine, 536; *Shearman & Redfield on Negligence*, § 441.

In this case it is hardly possible that the jury could have been misled by the instruction complained of, for in its terms it was not only legally correct but it was guarded by other instructions not excepted to, in regard to the competency of the parties to make for themselves such a contract as they might see fit, to limit the attendance for a longer or shorter period, or for a single visit; and that, without any limitation, the defendant might at any time discontinue his visits upon reasonable notice.

These instructions would seem to be all, if not more than all, under the testimony the defendant was entitled to. It appears that he was at the time, and had been the plaintiff's family physician; that he was sent for and responded in the usual manner, while there is nothing to show that he was not expected to attend so long as necessary, or that he did not so understand it. On the other hand, it appears affirmatively that he alone was relied upon as the attending surgeon, and so understood it.

Another objection is raised to the instruction as to the burden of proof. It is undoubtedly true that in an action of tort the burden is upon the plaintiff all through to give the jury reasonable satisfaction of the alleged wrong on the part of the defendant. But when the defendant takes the ground that the act or want of action was not a wrong because by the terms of the contract or its rescission he was justified, he assumes an affirmative and so far the burden of proof.

The defendant is charged with negligence in abandoning his patient while in need of medical care; admitting the fact of non-attendance, he attempts to justify, not only on the ground that no further attention was necessary, but also on the ground of notice that he should not attend further unless sent for; and that the contract was thus rescinded and he discharged.

As to the first ground, the burden will continue upon the plaintiff, for there would be no delinquency unless the defendant had failed to exercise the required judgment or carelessly neglected his duty. But upon the latter ground the defendant sets up a new fact in avoidance, and that he must prove before it can avail him. To this and this alone the instruction applied. The first part of it may perhaps be a little uncertain in its meaning, and the presiding justice, apparently so fearing, to prevent any misunderstanding adds these words: "So far as the discharge alone is concerned the burden of proof is upon the defendant to show that he was discharged." In this we see no error. *Exceptions overruled.*

APPLETON, C. J., DICKERSON, BARROWS, and VIRGIN, JJ., concurred.

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## COURT OF APPEALS OF MARYLAND.

(To appear in 41 Md.)

DEED. — DEFECTIVE ACKNOWLEDGMENT. — VESTED RIGHTS. — RETROACTIVE LEGISLATION. — DOWER.

### GROVE v. TODD.

On the 29th of November, 1866, T., being seised in fee of a tract of land in F. County, executed a deed in which his wife joined to bar her dower, conveying the tract, in consideration of love and affection, to certain children of his deceased illegitimate son, to whom his wife bore no blood relation. The deed purported to have been executed and acknowledged in F. County, before a justice of the peace for that county, but was in fact executed and acknowledged in C. County, where T. and his wife lived, before a justice for F. County. Such an acknowledgment was invalid by the laws of Maryland; but the Act of 1867, ch. 160, provided that all deeds so executed and acknowledged since November 1, 1864, should be as valid to all intents and purposes as if properly acknowledged. In December, 1866, before the passage of this act, T. died intestate, and soon after his widow filed a bill to have the deed declared a nullity and for assignment of dower. *Held:* (1.) That as against T. and his heirs, the deed, being a good grant at common law, and executed upon a strong moral consideration, was cured by the statute; (2.) That the deed, being without acknowledgment, was utterly null and void as against the wife both at law and equity; that the statute could not impart life to it, as against her, without interfering with her vested rights secured by the Declaration of Rights; and that therefore she was entitled to have dower assigned her in the land conveyed.

Retroactive legislation, to cure or confirm conveyances or other proceedings defectively acknowledged or executed, is sustainable upon the ground that it operates not upon the deed or contract, by changing it, but upon the mode of proof only.

A wife can only be divested of her dower by proper and legal acknowledgment, and a deed not so acknowledged is wholly inoperative as to her, and is to be treated as if she had not been a party to it.

APPEAL from the circuit court for Frederick County, in equity.

This appeal was taken by the complainants from a decree of the court below dismissing their bill. The facts of the case are sufficiently stated in the opinion of this court.

The cause was argued before Bartol, C. J., Stewart, Bowie, Brent, Miller, and Alvey, JJ.

*John J. Donaldson & Thomas Donaldson*, for the appellants.<sup>1</sup> The deed of the 29th of November, 1866, was not executed in the manner required by law to constitute it a valid conveyance. Intending to convey title to real estate situated in Frederick County, it was executed and acknowledged in Carroll County, where the grantors resided, before a justice of the peace for Frederick County. Therefore under the Maryland statutes, no estate passed to the grantees. Code, art. 24, secs. 1, 2, 3; *Gittings's Lessee v. Hall*, 1 H. & J. 14; *Hall v. Gittings's Lessee*, 2 H. & J. 380; *Byer v. Etnyre & Besore*, 2 Gill, 150; *Cockey v. Milne's Lessee*, 16 Md. 200; *Johnston v. Canby*, 29 Ib. 215, 216.

Then, immediately on the death of Benjamin Todd, the title to this land became vested in his heirs, subject to the widow's dower. If there had been a valuable consideration there would have been in those heirs a dry legal title, and the grantees could compel a conveyance by a bill for specific performance. But this was a mere *voluntary* deed, — in favor of persons, too, who stood in no legal relationship to either of the grantors. Certainly there was no meritorious consideration so far as Ruth Todd was concerned. Even where the consideration is that of love and affection to persons of the grantor's own family, specific performance will not be decreed of a contract or conveyance defectively executed; and imperfect deeds cannot be set up in equity, or reformed and corrected as against a married woman. 2 Kent Com. 465-6; 1 Story Eq. Jur. (19th ed.) sec. 706 a, sec. 787, secs. 793 b and d; *Pennington, Adm'r of Patterson, v. Gittings's Ex'r*, 2 G. & J. 208, 217; 2 Scribner on Dower, 299; *Martin v. Dwelly*, 6 Wend. 9; *Purcell v. Goshorn*, 17 Ohio, 105.

The appellees, however, rely upon the Act of Assembly of 1867, ch. 160, passed after the death of Benjamin Todd, as validating the deed of the 29th of November, 1866; and the learned judge below decided that such was the effect of that act. That act is unconstitutional and void in all cases where courts of equity would not decree specific performance, which could not be done under the circumstances of the present case.

If the object of the act was to give validity to all deeds whatever; among the rest, to mere voluntary deeds to which married women were parties, then it cannot accomplish that object. For that would be to divest vested rights. *Good v. Zercher*, 12 Ohio, 364, 368; *Silliman v. Cummins*, 13 Ib. 116; *Baughner v. Nelson*, 9 Gill, 299; *Regents of University of Md. v. Williams*, 9 G. & J. 408; *Thistle v. Frostburg Coal Co.* 10 Md. 129; *Johns v. Reardon*, 11 Ib. 465; *Chestnut v. Shane's Lessee*, 16 Ohio, 599; *Alter's appeal*, 67 Pa. 341.

*Charles W. Ross & William A. Fisher*, for the appellees. The Act of 1867, ch. 160, was a constitutional exercise of power with respect to all deeds. A law is not unconstitutional merely because it divests vested

<sup>1</sup> The arguments of counsel, except as to the question of the validity of the deed in controversy, are omitted. — R.E.P.

rights. *Baughers v. Nelson*, 9 Gill, 299; *Watson v. Mercer*, 8 Peters, 88; *Satterlee v. Matthewson*, 2 Ib. 413-14; *Regents, f.c. v. Williams*, 9 G. & J. 408.

There is nothing in the Constitution of the United States, or in the Bill of Rights or Constitution of Maryland, which takes from the legislature the power to disturb vested rights. *Baughers et al. v. Nelson*, 9 Gill, 306.

An act of assembly is void, if at all, not because it is condemned by some positive municipal law, to which it must yield, whatever may be the equities, but void only so far as it is contrary to the "first rules of right and justice;" rules, not rigid, but moulded to meet the circumstances of each case presented. *Beach v. Walker*, 6 Conn. 197; *Underwood v. Lilly*, 10 S. & R. 101; *Goshorn v. Purcell*, 11 Ohio N. S. 652.

The application of the act to the deed in controversy gratifies every rule of right and justice; it gratifies the intent of the donor, and defeats fraud and inhumanity. The courts have expressed the same views in different language, when they say that there can be no vested right to do wrong. *Baughers et al. v. Nelson*, 9 Gill, 309; *Foster v. Essex Bank*, 16 Mass. 245; *State v. Newark*, 3 Dutcher, 197; Cooley's Cons. Limitations, 370, 358, (3d ed.) margin.

Curative acts have never been considered as in any sense an interference with vested rights. They merely cure informalities not affecting the substantial equities of parties. Cooley, 369-379; *Regents' case*, 9 G. & J. 413; *Baughers et al. v. Nelson*, 9 Gill, 306; *Harrison v. Harrison*, 22 Md. 468; *Shonk v. Brown*, 61 Penn. St. 327; *Hollingsworth v. McDonald*, 2 H. & J. 236-37.

The whole object of an acknowledgment is to furnish evidence, and primarily, if not entirely, to the clerk, that he may be justified in admitting the instrument to record. The deed would have been good at the common law, without any acknowledgment, but the legislature determined that the *proof* of its execution should be an acknowledgment before a particular officer. There is no vested right to have the rules of evidence remain unchanged. Cooley, 367, 368 (3d ed.), side paging; *Gibbs v. Gale*, 7 Md. 86, 87.

That the acknowledgment is to be treated merely in the nature of proof, is further apparent from the passage by the general assembly of the Act of 1868, ch. 325. Code, art. 24, sec. 16.

The appellants conceded that the act of assembly would be sufficient to validate a deed which was based upon a valuable consideration, because, they say, the defective instrument is evidence of an equity in the grantee, which might be enforced by a court of equity, while under the deed in controversy there is no equity which could be assisted. *Preston v. Fryer*, 38 Md. 221.

There is no foundation for the distinction attempted, in the application of such acts of assembly, to deeds in which an equity does, and those in which it does not pass. Besides this, the Act of 1868 would give to the infants a standing in a court of equity, to enforce the deed, even if they had it not before; and it could be enforced against the heirs-at-law of Benjamin Todd, as well as against Benjamin Todd himself, and his wife, the complainant. We deny, however, that in this state, a court of

equity would ever have declined to recognize an equity in the infants, under the circumstances of this case. The harsh rules of the common law with respect to illegitimate children have never prevailed in this state as in England. *Pratt v. Flamer*, 5 Harr. & Johns. 20, 21.

Courts of equity will sometimes enforce a voluntary settlement in favor of illegitimate children. *Marchioness of Annandale v. Harris*, 2 P. Wms. 482; *Bunn v. Winthrop*, 1 Johns. Ch. 388.

The complainants could not in any event have the benefit of the objection that the title of the heirs-at-law of Benjamin Todd had become vested prior to the passage of the act. *Harrison v. Harrison*, 22 Md. 468; *Watson v. Mercer*, 8 Peters, 88.

ALVEY, J., delivered the opinion of the court.

There are but two questions presented by the record in this case. First, whether the defective or invalid acknowledgment of the deed of the 29th of November, 1866, by Benjamin Todd, and Ruth his wife, has been so far aided and cured by the Act of the Legislature of 1867, chapter 160, as to render the deed valid and effectual as against the wife to bar her right and claim to dower in the land attempted to be conveyed; and if such has been the effect of the Act of 1867, secondly, whether the wife Ruth was induced to sign or execute the deed under such circumstances of fraud and circumvention as will entitle her to relief from its operation.

The deed purports to convey a farm of about 1,318 acres of land in Frederick County to Benjamin H. Todd and Jesse E. Todd, children of Jesse Todd, deceased, the illegitimate son of Benjamin Todd, the grantor. The consideration expressed in the deed was the love and affection which the grantor, Benjamin Todd, bore to the grantees, whom he called his grandchildren. The wife Ruth bore no blood relation whatever to these children. The deed, while it professes to have been executed and acknowledged in Frederick County, before a justice of the peace of that county, was in fact executed and acknowledged in Carroll County, where the grantor and his wife at the time resided, before a justice of the peace of Frederick County. Benjamin Todd, the grantor, died intestate in December, 1866, and his widow, one of the appellants, intermarried with Samuel Grove, the other appellant, some time in the summer of 1867. The bill is filed by the appellants to have the deed declared a nullity, and for the assignment of dower in the land attempted to be conveyed. A large mass of proof has been introduced, reflecting upon the question of fraud, but from the view we have of the case it will become unnecessary to determine whether the allegations of fraud be fully sustained or not.

1. As to the question of the defective or invalid acknowledgment of the deed.

That the deed is wholly inoperative and void, as against the wife, without the aid of the Act of the Legislature of 1867, chapter 160, has not been denied, or in any manner controverted; but it is insisted by the appellees that the act just referred to has effectually cured and made valid the otherwise void acknowledgment, and that the deed, by means of the curative act, operates to extinguish all right of dower in the land mentioned.

The language of the act relied on is certainly broad and comprehensive. It declares, "That all deeds executed and acknowledged by the

grantors, since the first day of November, 1864, in the county in this state in which the grantors then resided, before any other justice of the peace of any other county in this state, duly commissioned and qualified, shall be as valid to all intents and purposes as if acknowledged in the county where the lands in whole or in part are situate, before a justice of said county, or as if acknowledged before a justice of the peace of the county in which the grantors resided." Before the passage of this act, Benjamin Todd had died, and by that event the widow's right to dower in the lands mentioned in the deed had become vested and absolute; and she is now entitled to have that dower assigned, unless her right is barred by the deed of the 29th of November, 1866.

By the common law, a *feme covert* could not release or convey her inchoate right of dower in her husband's lands by deed, but only by fine or common recovery. In this state, however, she is enabled by statute to release her dower either by joining in the deed of her husband, or by separate deed, accompanied in either case by proper acknowledgment, as the law directs. Code, art. 45, sec. 11. This acknowledgment is required to be made, if within the state, either before some judge or justice for the county or city within which the real estate, or some part of it, lies, or some judge or justice for the county or city in which the grantor may be at the time of acknowledgment; and if before a justice of the peace of a county or city other than that in which the land lies, the official character of such justice is required to be certified by the clerk of the court; and without the acknowledgment thus required, it is declared that no estate of inheritance or freehold, or any declaration or limitation of use, or any estate for above seven years, shall pass or take effect. Code, art. 24, secs. 1, 2, 3. The acknowledgment is therefore essential to the validity of the deed, as a legal conveyance, and not only so, but it must be before the proper officer; for if made before a justice of the peace out of the county or city for which he was appointed, the acknowledgment is as inoperative and void, as if the person taking it was wholly without official character. *Byer v. Etnyre & Besore*, 2 Gill, 151. Whatever may be the effect and operation of the deed, without proper acknowledgment, as against the husband, it is certain that the wife could only be divested of her estate by proper and legal acknowledgment, and a deed not so acknowledged is *wholly inoperative* as to her, and is to be treated as if she had *not been a party to it*. *Johns v. Reardon*, 11 Md. 465; *Steffey v. Steffey*, 19 Ib. 5. The deed before us, being without acknowledgment, was utterly null and void as against the wife, *both at law and in equity*, and she was under no obligation, and could not be compelled, to rectify it, so as to give it operation and effect. *Gebb v. Rose*, 40 Md. 387; *Drury v. Foster*, 2 Wall. 24.

Such then being the state and condition of the widow's title to dower in the lands mentioned in the deed, at the time of the passage of the Act of 1867, chapter 160, was it within the constitutional power of the legislature, by retroactive legislation, to give force and validity to the deed, as if properly acknowledged, and thus divest a vested estate?

That the legislature may, in proper cases, by retroactive legislation, cure or confirm conveyances, or other proceedings, defectively acknowledged or executed, we entertain no doubt. As authority for the exercise

of such power, we have long usage and many precedents. Such legislation is sustainable, because it is supposed not to operate upon the deed or contract, by changing it, but upon the mode of proof only. *Journey v. Gibson*, 56 Penn. St. 57; *Shonk v. Brown*, 61 Ib. 321. And in this case we are of opinion that the Act of 1867, chapter 160, has operated to cure and make effectual the deed before us, as against the husband and his heirs. The deed was a good grant at the common law, as against the husband, and he executed it upon a strong moral consideration, apart from the fact that it was designed to carry out a long settled and determined purpose of his so to dispose of the estate. But not so as to the wife. As to her, she being without capacity to make a deed or contract, except in a particular mode, not complied with in this case, the deed by which she is now sought to be barred was no more than a blank piece of paper; and as when vested rights are spoken of by the courts as being guarded against legislative interference, they mean those rights to which a party may adhere, and upon which he may insist without inflicting a wrong upon others. 9 Gill, 309. We think the right of the appellant in this case is of that character. She has a right to insist, according to the Declaration of Rights, art. 23, that she shall not be disseised of her freehold, liberties, or privileges, or deprived of her property, otherwise than by the judgment of her peers, or by the law of the land; or, as these latter terms are defined, by due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. 2 Kent's Com. 13; *The Regents v. Williams*, 9 Gill & Johns. 412; *Wright v. Wright*, 2 Md. 452; *Westervelt v. Gregg*, 12 N. Y. 209; *Reese v. City of Watertown*, 19 Wall. 122. The deed being utterly void and without effect as to her estate, if she is now divested of her right of dower, it is by force of the statute, and not of the deed; the statute operating through the form of the otherwise void deed to transfer the estate. To concede to the legislature the power, by retroactive legislation, adopted without the consent of the party to be affected, to accomplish such a result, is at once to concede to it the power to divest the rights of property and transfer them, without the forms of law, upon any notion of right or justice that the legislature may think proper to adopt, — a concession that can never be made in a government where the rights of property do not depend upon the mere will of the legislature, and which professes to maintain a regular system of laws for the protection of the rights of property of its citizens.

Great reliance has been placed on several cases cited in argument, supposed to be in support of the constitutional power of the legislature to cure and make valid deeds, such as the one now under consideration. But upon examination they will be found to be cases essentially different from the one now before us. The first of the cases cited is that of *Hollingsworth v. McDonald*, 2 H. & J. 230. There, under a deed of settlement of land which had belonged to the wife before marriage, the estate was limited to the separate use of the wife for life, with a vested estate in fee tail to her son, the reversion in fee to the mother, the son being by a former husband. After the marriage, the husband and wife, together with the trustee, in whom the legal estate was vested, made a deed of bargain and sale to the son of the fee simple estate in the land. In the acknowledg-



ment of this deed, the word "fear" was omitted, though the deed and acknowledgment were in all other respects regular and formal. The son was let into possession under the deed, and died in possession of the land, having by his will devised it to his mother. The son having died insolvent, his creditors filed a bill against his mother and her husband, treating the mother as devisee, and prayed a sale of the land for the payment of the son's debts. To this bill the husband and wife answered, *admitting* that the son died seised in fee of the land, and that he had devised the same to his mother. Whereupon a decree for sale was passed, a sale made and reported, and which was confirmed *by consent* of the husband and wife. Afterwards they filed a bill in the nature of a bill of review, wherein they alleged that they had, since the ratification of the sale, discovered that the deceased son had never been seised of the fee in the land, but the same belonged to the mother, and that the deed to the son was not so acknowledged as to pass the estate of a *feme covert*. This bill was dismissed by the chancellor, and the case was taken to the court of appeals, and after it was there argued, but before decision rendered, the Curative Act of 1807, chapter 52, was passed, which the court of appeals said operated to render the deed valid and effectual. Such was the case of *Hollingsworth v. McDonald*, *supra*, and certainly it falls far short of an authority for the support of legislative power to impart life and operative vitality to a deed, such as that before us, as to the estate of the wife.

The next case relied on is that of *Dulany & Dangerfield v. Tilghman*, 6 Gill & J. 461. That was a case where a deed of settlement was defectively executed, and the legislature, *upon the application of the grantor*, having made another or a modified settlement, it was held, that the first deed was not affected by the subsequent general acts of the legislature, intended to cure deeds defectively executed. Whether the act of the legislature, involved in that case, was nugatory and void, as an unauthorized usurpation of power denied to the legislature, upon principles of common right or constitutional restriction, was a question which the court expressly said they were relieved from considering. "The title of the property," said the court, "by reason of the defective acknowledgment, remaining in the petitioners, it was unquestionably competent for the legislature, *at their request*, to settle it in the mode prescribed by the act of assembly." There was nothing decided in that case that in any manner conflicts with what we decide in this.

The case of *Baughner v. Nelson*, 9 Gill, 299, is also relied on by the appellees; but we can perceive nothing in that case that supports the position assumed by the appellees' counsel. That was the case in which it was decided that a defendant had no such vested or constitutional right in a defence of usury to an otherwise honest and proper debt, whereby he was enabled to insist upon the forfeiture of the entire debt, as should be guarded and saved from the operation of a repealing act of the legislature. The court said there was no vested right, in the proper sense of the term, divested by the act of the legislature then under review; that the act was no more than the proper exercise of the legislative authority over the subject of remedies; a power which can be exercised as well in relation to past as to future contracts. That when vested rights are

spoken of by the courts as being guarded against legislative interference, they mean those rights to which a party may adhere, and upon which he may insist, without violating principles of sound morality.

The case of *Harrison v. Harrison*, 22 Md. 468, also relied on, decides nothing that properly applies to this case. The marriage that was celebrated in the District of Columbia between the uncle and his niece was held *not* to be *ipso facto* void, but only voidable upon judgment or decree pronounced in the life-time of the parties, in a direct proceeding taken for the purpose; and the Marriage Act of 1777, chapter 12, imposing the disability, being penal in its character, it was further held to be competent to the legislature, by the subsequent Act of 1860, chapter 271, to relieve from the disability, and to make such marriage valid. This can in no manner aid the appellees in this case.

There were cases from other states referred to, those most relied on being cases decided by the supreme courts of Pennsylvania and Ohio. In those two states, legislation of the character here involved appears to have been maintained to the greatest extent. In the first of these states, the principle upon which such retroactive laws are supported, as stated in one of the earlier decisions upon the subject (*Underwood v. Lilly*, 10 S. & R. 101), and also in one of the latest (*Shonk v. Brown*, 61 Penn. St. 327), is, that they shall impair no contract, nor disturb any vested right, but only vary remedies, cure defects in proceedings otherwise fair, which do not vary existing obligations contrary to their situation when entered into and when prosecuted. In Ohio, according to the latest decision (*Chesnut v. Shane*, 16 Ohio, 599), such legislation can be maintained only where it operates upon that class of deeds where enough has been done to show that a court of chancery ought, in each case, to pass a decree for a conveyance; that where the title in equity is such that a court of chancery ought to interfere and decree a good title, it is within the power of the legislature to confirm the deed, without subjecting the parties to the expense of litigation. It is manifest that the decisions in neither of these states can be invoked as authorities for the appellees as against the appellants.

The conclusion is, from what has been said, that we are of opinion that the deed before us is not affected or rendered operative by virtue of the Act of 1867, chapter 160, as against the *feme covert*, one of the appellants, though it is cured and rendered operative as against the heirs of Benjamin Todd, the grantor; and therefore the decree appealed from must be reversed, and the cause remanded, that a proper decree be passed by the court below, providing for and directing the assignment of dower in the lands mentioned, as prayed by the bill.

*Decree reversed, and cause remanded.*

STEWART, J. dissented.

## SUPREME COURT OF MAINE.

(To appear in 64 Maine.)

PROMISSORY NOTE. — WHEN NEGOTIABLE. — PRACTICE.

COLLINS v. BRADBURY.

A note in the ordinary form, payable to order at a definite time, for a specified sum in money, is negotiable, notwithstanding the addition of the words, "said promise made for a colt, this day taken; said colt holden for the payment of said amount."

A nonsuit will not be ordered for a slight verbal variance between the note in suit and the declaration, when "the person and case can be rightly understood," and it is apparent that the declaration was intended to and does embrace the note in suit.

ASSUMPSIT upon a promissory note, which is recited in the opinion. The declaration was as follows: —

"In a plea of the case, for that the defendant, at Fort Fairfield, on the 24th day of June, 1869, by his promissory note of that date, by him signed, for value received promised to Joseph Chandler to pay him or order, the sum of \$90, half in March next, the dollars balance in September next, and cents, with interest. Said promise made for a colt, this day taken, said colt holden for the payment of said amount. And said Joseph Chandler thereafterwards, on the same day, indorsed, sold, and delivered said note to the plaintiff, by reason and in consideration whereof, the defendant became liable, and promised the plaintiff to pay him the contents of said note, according to the tenor thereof."

The defendant moved for a nonsuit upon the ground that the note was not negotiable and because the one offered in evidence did not correspond with that described in the declaration; and to the refusal to grant this motion, he excepted.

*Madigan & Donworth*, for the defendant.

*L. Powers*, for the plaintiff.

APPLETON, C. J. This is an action of assumpsit by the plaintiff as the indorsee of a note of which the following is a copy: —

"FORT FAIRFIELD, June 24, 1869.

"For value received, I promise to pay Joseph Chandler or order ninety dolls., one half of which to be paid in March next, the remainder in Sept. next, after with interest. Said promise made for a colt, this day taken, said colt holden for the payment of said amount. C. C. BRADBURY."

Indorsed: "Without recourse to me.

JOSEPH CHANDLER."

It is objected that the note is not negotiable, inasmuch as by the last clause the consideration of the note is stated, and that the colt should be holden for its payment.

The essentials of a promissory note are, that it is payable to order or bearer, in money, at all events, and not upon any contingency, nor out of any particular fund.

The note in suit has all these elements. That it states the consideration for which it was given; and that, if recorded, it might operate as a mortgage, does not render it any the less a promissory note. Thus, in

*Fancourt v. Thorne*, 58 E. C. L. 310, the note was in the following terms: "On demand I promise to pay H. or order, £500, for value received, with interest at the rate of," &c.; "and I have lodged with the said H. the counterpart leases signed by D.," &c. "for ground let by me to them respectively as a collateral security for the said £500 and interest," and the court held that it was a promissory note, and might be sued as such. In *Arnold v. Rock River Valley R. R. Co.* 5 Duer, 207, it was decided that an instrument, which in its terms and form is a negotiable promissory note, does not lose that character because it also states that the maker has deposited bonds as collateral security for its payment, and that he agrees on non-payment of the note at maturity, that they may be sold in a manner, and upon a notice specified, and he will pay any deficiency necessary to satisfy the note, and the expenses of such sale. "The terms of this contract," observes Bosworth, J., "do not modify that part which contains a promise to pay, absolutely, to the order of the persons named in it, a sum certain, and on the day specified." So here, that there may be property holden to secure its payment, does not prevent the note in suit being negotiable.

Objection is taken that the note does not sustain the declaration. True, the writ is not a model of artistic pleading, but we think there is no fatal variance. The note has "ninety dolls.," the declaration, "\$90" (in figures); the note says, "remainder," the declaration, "balance;" the note says, "Sept.," the declaration, "September;" but all this does not prevent the person and case from being rightly understood. The note is payable with interest. "The remainder in September next after," is next after the preceding payment, which was to have been made in March.

*Exceptions overruled.*

DICKERSON, DANFORTH, VIRGIN, PETERS, and LIBBEY, JJ., concurred.

## SUPREME COURT OF CALIFORNIA.

[NOVEMBER, 1875.]

CONSTITUTIONAL LAW. — INVALIDITY OF STATUTES TO VALIDATE VOID JUDGMENTS.

PRYOR v. DOWNEY.

An act which has the effect of rendering valid formal judgments, entered by a court without jurisdiction, is to be regarded as an exercise of judicial functions by the legislature, and as a contravention of the provision that no person shall be deprived of property without due process of law, and is, therefore, void.

THE facts are set forth in the opinion.

MCKINSTREY, J. The Act of April 2, 1866, reads as follows: "In all cases where real estate has been sold in this state, under the order of the probate courts of the several counties, to purchasers in good faith, and for

a valuable consideration, and defects of form, or omissions, or errors exist in any of the proceedings, such sales are hereby ratified, confirmed, and made valid, and *sufficient in law* to transfer the title of the property sold, provided, however, that this act shall not affect, in any manner, rights acquired prior to its passage by vendees, grantees, or mortgagees who claim interests in or liens upon such property under heirs or devisees adversely to such probate sales, nor to sanction in any manner cases of actual fraud. Statutes of 1865-66, p. 824.

At the former hearing, this court expressed the opinion that the words "defects of form, omissions, or errors," did not embrace a want of power in the person assuming to act as administrator, or the absence of jurisdiction in the court which ordered the sale.

Inasmuch, however, as the members of the court were not unanimous in the construction then given, and in deference to the urgent appeal of counsel, we have given to the principal question suggested the investigation its importance demanded. As the result of such investigation we are compelled to announce (assuming the act to have been intended to render valid and sufficient in law the formal judgments of the probate courts, in themselves null) that the statute is without effect, in so far as it attempts to validate such void judgments.

A long series of decisions in this state — uniformly holding to the same rule — has determined that the application of an executor or administrator for the sale of lands belonging to the estate is a special and independent proceeding; that the jurisdiction of the probate court depends absolutely on the sufficiency of the petition — in other words, on its substantial compliance with the requirements of the probate act. Though the proceeding for this sale occurs in the general course of administration, it is a distinct proceeding in the nature of an action in which the petition is the commencement and the order of sale is the judgment. The necessity for a sale is not a matter for the executor or administrator to determine, but is a conclusion which the court must draw from the facts stated, and the petition must furnish the materials for its judgment. *Gregory v. McPherson*, 18 Cal. 562; *Townsend v. Gordon*, 19 Ib. 188; *Gregory v. Taber*, Ib. 397; *Spriggs' Estate*, 20 Ib. 121; *Haynes v. Meeks*, Ib. 288, and 10 Ib. 1-10. And the jurisdiction of the probate court to order the sale depends on the averments in the petition and not on the truth of those averments. *Fitch v. Miller*, 20 Cal. 352; *Haynes v. Meeks*, *supra*.

It is unnecessary to point out the defects in the petition found in the transcript. It is beyond all question that it was insufficient to authorize the court to order this sale. It is certain, therefore, that the judgment, in form, ordering the sale, is utterly void, unless the Act of April 2, 1866, has given it vitality.

Even if we were convinced that the decisions to which we have referred were erroneous, and felt ourselves at liberty, at this day, to hold that the proceeding which led up to the order of sale was merely ancillary to the general administration, and any defects in the petition were but irregularities not affecting the jurisdiction of the court to order the sale, as part of the general proceedings for the settlement and distribution of the estate, there is yet another fact in this record which shows the action of the probate court to have been absolutely void. It was found by the district

court that Foster was never appointed administrator, but that a conditional order only was made to the effect that he should become administrator, on giving security by filing the bond required by law; and it is further found that he never filed such bond, or otherwise qualified as such administrator. The order for the appointment, the qualification of the appointee, and the issuing of letters to him, were all necessary proceedings to invest such appointee with the office of administrator. *Estate of Hamilton*, 84 Cal. 464. The letters of administration may indeed, when issued, be evidence of the regularity of the previous proceedings; but here no letters were ever issued, and it affirmatively appears that no bond was ever filed, nor oath taken. Foster, therefore, was not administrator of the estate; and both the pretended sale by him and the order purporting to authorize it made by the probate court — then a court of inferior and limited jurisdiction — were inoperative to transfer to the purchaser any right or estate in the land, legal or equitable. Nor can any recognition by the probate court make one an administrator *de facto*. No person can fill that position except after due appointment and qualification. Under our system, there is probably no such thing as executor *de son tort*; at all events, no man can be executor *de son tort* in regard to land. And generally it may be said, an executor *de son tort* is an executor only for the purpose of being sued, or made liable for the assets with which he has intermeddled. Bouv. Law Dict. It necessarily follows, that an attempted sale of land of an estate by one not executor or administrator can transfer no right, even though there should be a subsequent order of the probate court as upon a final accounting by the pretended administrator.

The forty-sixth section of the Act of April 20, 1863, "Concerning the Courts of Justice and Judicial Officers" (Stats. 1863, p. 323), did not render the order directing the sale presumptively regular, and within the jurisdiction of the probate court. It is not necessary to inquire whether that act is, in other respects, applicable to the facts of the present case; it is enough to say that it clearly refers only to the probate courts to be organized under the constitutional amendments of 1862, and not to the probate courts previously existing. That act repealed the statute of 1853, and those amendatory thereof, which had provided for the organization of the courts and the duties of judicial officers; such repeal to take effect only when the organization of the courts under the constitutional amendments should be perfected; and it also fully defined the jurisdiction and duties of the courts and judicial officers under the amendments. That the rule declared in the forty-sixth section of the act was not intended to apply to the old probate courts is demonstrable from the circumstance that it was to take effect only after those courts had gone out of existence, and when the new courts had supplanted them. The old probate court — a court of inferior and limited jurisdiction — ceased at the same moment of time that the new probate court — whose "records, orders, judgments, and decrees," were to have accorded to them the like force and effect, and legal presumptions, as those of the district court — began to exist.

The question which remains to be considered is this: Has the legislature power to make a pretended and void judgment, entered by a court without jurisdiction, valid and effective for any and all purposes?

Very able jurists have intimated that the courts of some of the states have gone further than correct principles would warrant to sustain retroactive laws, — a species of legislation always cautiously to be admitted, because obnoxious to most serious objections. Nowhere, perhaps, had the courts gone farther in that direction than in Pennsylvania. The indignant language of Chief Justice Gibson, in *Greenough v. Greenough*, indicates his opinion that such decisions had brought the law of that state to an unenviable condition. "In a moral or political aspect," says he, "an invasion of the right of personal security. But retroactive legislation began and has been continued because the judiciary has thought itself too weak to withstand; too weak because it has neither the patronage nor the prestige necessary to sustain it against the antagonism of the legislature and the bar. Yet had it taken its stand on the rampart of the Constitution in the outset, there is some little reason to think that it might have held its ground. Instead of that it pursued a temporizing course, till the mischief had become intolerable, and till it was compelled, in *Norman v. Heist*, and *Bolton v. Johns*, to invalidate certain acts of legislation, or rather to reverse certain legislative decrees." 11 Pa. St. 495. And the supreme court held that in Pennsylvania, the legislature could not exercise judicial power, nor take away property without due process of the law.

The repugnance of Chancellor Kent to this species of legislation appears from his very able opinion in *Dash v. Van Kleeck* (7 Johns. 497). In his Commentaries, after saying, "A retrospective statute, affecting and changing vested rights, is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void" (vol. i. p. 456), he adds, that this does not apply to a remedial statute which may be of a retrospective nature; and he then proceeds to define such statutes with so many conditions and restrictions as show how much he was impressed with the danger of an abuse of the power, unless restrained by constant reference to its many limitations under our American constitutions. Among these conditions he declared "that it has been held" the courts may regard the circumstance that a law "is clearly just and reasonable;" but he is careful not to commit himself to the statement that such matters may be at all considered when the sole question is one of legislative power. The reference seems to be to *Goshen v. Stonington* (4 Conn. 209), a judgment which may be sustained on other grounds, but where the court seem to have relied on the aphorism of Bacon, that retroactive laws ought not to be passed, *nisi ubi leges cum justitia retrospicere possint*. But the Connecticut case was not decided on the broad ground that such laws may be enacted in an American state whenever they appear to be just and reasonable, nor could it have been without a clear violation of fundamental principles.

In both instances referred to in the "Commentaries," and which are ordinarily referred to as illustrations of the power to pass retroactive laws, being statutes to confirm former marriages defectively celebrated, and to confirm sales of land defectively acknowledged, the contracts were such as would have been valid at the common law, and the effect of the subsequent statute was simply to remove an obstacle created by a former statute. The author remarks: "The legal rights affected in those cases

by the statute were deemed to have been vested subject to the equity existing against them, and which the statute recognized and enforced." And statutes, to cure defective acknowledgments, seem originally to have been sustained on the theory that the vendor, upon established principles of equitable cognizance, had parted with the title to the land. Thus, in *Chesnut v. Shane's Lessees* (16 Ohio R. 599), the supreme court of Ohio expressly say of such a curative act: "It operates only on that class of deeds when enough has been done to show that a court of chancery ought in each case to render a decree for a conveyance, assuming that the certificate was not such as the law required. And when the title was such that equity ought to interfere and decree a good legal title, it was within the power of the legislature to confirm the deed, without subjecting an indefinite number to the useless expense of unnecessary litigation."

Nowhere does Chancellor Kent intimate an opinion, that the legislature can validate a pretended judgment of a court, rendered without the acquisition of jurisdiction, or that it can annul a valid judgment. He closes his remarks on the subject with the warning: "The cases cannot be extended beyond the circumstances on which they repose, without putting in jeopardy the energy and safety of the general principles. Nor can the power to validate a void decree be employed indirectly, by declaring how a judicial question—arising on the law as it stood prior to the declaratory statute—ought to have been decided. As suggested in a note (1 Kent Com. 456), "It seems to be settled, as the sense of the courts of justice in this country, that the legislature cannot pass any declaratory act, or act declaratory of what the law was before its passage, so as to give it any binding weight with the courts." And this position is supported by an abundance of authority.

The Legislature of California cannot exercise any judicial function, and no person in this state can be deprived of life, liberty, or property, without due process of law. Constitution, Art. III. sec. 8.

It would be very difficult, if not impossible, to harmonize the decisions of the courts of the several states of the Union relative to the subject we are now considering, although the divergence in the reasoning of the courts is not so great as the judgments would seem to indicate. But it has always been held where a constitution similar to our own exists, that the legislature can neither exercise judicial power nor deprive a citizen of his property, except by the law of the land; the doubt sometimes being, what is the property, or the vested rights, of which he may not be so deprived. In the present case it cannot be pretended that the purchaser at the Foster sale acquired any equitable estate, which he could make the foundation of an action against the heirs or devisees, and that the effect of the statute was to transform an equitable into a legal title. *Chesnut v. Shane's Lessees*, *supra*. As to any vague, indeterminate, and indeterminate "moral equity,"—if any such exist,—it may well be doubted whether we can recognize such, since the courts have no standard by which to estimate its sufficiency or effectiveness. Even if we could adopt, however, the measure of right suggested by some of the cases, we are not prepared to hold that the plaintiff in this action may not insist upon his complete legal and equitable title, without violating any principle of moral-



ity. 9 Gill, 299. Admitting that the estate of the ancestor comes to the heir burdened with the debts of the former, it is still the right of the latter — when courts are organized or are required by the Constitution to be organized, for the settlement of the estates of decedents — to have the debts ascertained and the property applied by a tribunal of competent jurisdiction. And, upon any theory, the doctrine of estoppel, which is claimed to impose an imperfect duty capable of being ripened into a perfect obligation by the legislative will, can have no application, unless a party by his own contract, or other voluntary act, has placed himself in such an attitude that it would be a violation of sound morality on his part for him to adhere to and insist on his legal and equitable rights. It ought not to be made to apply to this plaintiff merely because he was a party as an infant to a pretended legal proceeding.

It would seem to have been said by the supreme court of Indiana, that a void judgment could be rendered valid by a subsequent act of the legislature. *Walpole v. Elliott*, 18 Ind. 259. But, as is pointed out by Judge Cooley (Const. Lim. 383, note 3), the language employed was broader than the facts called for, since, in this case, there was not a failure of jurisdiction, but an irregular exercise of it. And that learned writer thus lays down the rule as to retrospective statutes in respect to legal proceedings: "In judicial proceedings, if there was originally a failure of jurisdiction, no subsequent law can confer it." Const. Lim. 383. "A retrospective statute curing defects in legal proceedings where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds, unless expressly forbidden." P. 371.

In *Nelson v. Rountree*, the supreme court of Wisconsin treat as "not to be discussed at this day" the proposition that the legislature is competent to declare that to be a judgment, which before was no judgment. 23 Wisc. 370. And in reference to the statute of 1866, may be repeated what was said by the supreme court of Illinois, in respect to a statute not very dissimilar: "If it was competent for the legislature to make a void proceeding valid, then it has been done in this case. Upon this question we cannot for a moment doubt or hesitate. They can no more impart a binding efficacy to a void proceeding than they can take one man's property from him and give it to another. Indeed, to do the one thing is to accomplish the other." *McDaniel v. Cornell*, 19 Ill. 228.

As we have seen, the order of the probate court directing the sale by Foster, and the sale of the 19th of September, 1853, were void. If, prior to the enactment of April 2, 1866, the validity of the sale in question had been presented to this court, even in a collateral proceeding, we must have held, both upon reason and authority, that it transferred to the purchaser no estate in the land. Had the district and supreme court in fact decided the sale by Foster to be void, and the legislature had then enacted that the judgment should be set aside and the validity of such sale again be made the subject of judicial inquiry, the interference by the legislature with a distinct department of the government would be palpably apparent to every mind. In every case — and the instances are few — in which such a law has been passed upon by the courts of a state, having a written constitution, it has been declared unconstitutional, — even

when there was in the written constitution no express provision prohibiting the legislature from exercising judicial power. But had the legislature gone one step further, and, by special enactment or by general law covering the case, commanded the courts which had rendered a judgment in favor of a plaintiff, in an action based on the invalidity of the Foster sale, to set it aside and enter a judgment for the defendant, such arbitrary attempt would at once have been recognized as an abuse not to be tolerated under our free constitution of government.

The circumstance that the validity of this very order of sale had never been before the courts, does not make the statute (assuming that it applies to such order) any the less an effort summarily to dispose of a question purely judicial, or to deprive citizens of their property "without due process of law." This last expression is the equivalent of "the law of the land;" a law, "which," as said by Mr. Webster in the Dartmouth College case, "hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

If we assume the act to have validated the Foster sale (and order of sale), then the lands which up to the date of the act — April 2, 1866 — belonged to the heirs of Nathaniel M. Pryor, from that date became the property of other persons, and this transfer was accomplished by the legislative act alone. And even if we could indulge the fiction that the parties to be deprived of their estates had notice of the intended act, and a hearing and opportunity to produce witnesses, or to show cause why the act should not be passed, this would have been a species of trial and the exercise of judicial power by the legislature.

Sections 154 and 155 of the Probate Act of 1851 read as follows:—

"When the personal estate in the hands of the executor or administrator shall be insufficient to pay the allowance to the family, and all the debts and charges of the administration, the executor or administrator may sell the real estate for that purpose upon the order of the county judge. To obtain such order he shall present a petition to the probate court, setting forth the personal estate that has come to his hands, and how much thereof, if any, remains undisposed of; the debts outstanding against the deceased as far as the same can be ascertained; a description of all the real estate of which the testator or intestate died seised; and the condition and value of the respective portions and lots, the names and ages of the devisees, if any, and of the heirs of the deceased, which petition shall be verified by the oath of the party presenting the same."

It cannot be doubted that the effort to ascertain the existence or non-existence of the facts which, under the law, can alone authorize a sale of real estate is a judicial inquiry, and that the finding of facts which must precede the order of sale is a judicial finding. The determination that a sale is necessary for a purpose stated in the petition is an adjudication, and the power thus to adjudicate may be and has been appropriately placed in the probate court,—a judicial tribunal expressly named as such in the sixth article of the Constitution, which treats of the "judicial department."

As appears, however, in the present case, the petition was fatally defective, and the probate court had no power to authorize Foster (not an executor or administrator) to make a sale. We can discover no well

founded distinction between a want of jurisdiction as to the persons of parties to a proceeding, and an entire failure of jurisdiction as to the subject matter, — such as appears by this record. In Massachusetts, if, when a widow presents her petition to the probate court to have her homestead set off, the heirs dispute her claim, the issue between her and them must be tried in some other court. But, notwithstanding the opposition of the heirs, the probate court heard the matter, and after a trial, *in which all parties in interest participated*, entered a decree denying the petition, on the ground that the widow had no homestead. In proceedings before a court of competent jurisdiction, she afterwards sought to assert her claim to a homestead. Her claim was opposed on the ground, amongst others, that her right had been terminated by the decree of the probate court. But the supreme court of Massachusetts held — notwithstanding the probate court had fully acquired jurisdiction of the *persons* of all interested, and, but for the opposition of the heirs, would have had power to enter the decree — that the decree was absolutely void. Freeman on Judgments, 264; *Mercier v. Chace*, 9 Allen, 242. Had all interested in Pryor's estate been present when the order of sale was made (as it is claimed they were), the court would have had no power to order a sale by one on whom the power to sell could not be legally conferred, nor to inquire, in the absence of a *petition*, whether a sale was legally necessary for any purpose *which might have been set forth* in a proper petition.

As the proceeding in the probate court was void, no adjudication was made prior to the Act of April 2, 1866, and, as we have seen, the legislature cannot adjudicate upon the legal rights of parties. Such questions as are judicial in their nature are not to be settled arbitrarily or capriciously, but by the application of fixed rules and established principles. A judgment must be the result "of due inquiry sufficient to satisfy the discretion and convince the judgment of the officer of the law, in whom the authority and jurisdiction to decide the question involved have been duly vested." *Denny v. Mattoon*, 2 Allen, Mass. 380. Until such adjudication no proper foundation is laid for the order of sale, nor in the absence of such adjudication by the court of competent jurisdiction, can the property of heirs or devisees be said to be taken from them by due process of law. If they are to be held to all the consequences which would have followed from a proper and valid adjudication, it must be by virtue of the Act of 1866, and not by virtue of any judgment of the probate court. Such a statute constitutes an attempted exercise of the judicial power by the legislature; it is not for those who seek to uphold such exercise of power to say that it is not judicial, because not employed after due notice, or a trial of any issue of law or fact.

It may be claimed, however, that the statute of 1866 is strictly remedial, that it goes only to the curing of irregularities, and does not extend to matter of jurisdiction within the rule which prohibits such legislation. On this point it has been said: "We know of no better rule to apply to cases of this description than this. If the thing wanting, which failed to be done, and which constitutes the defects in the proceedings, is something which the legislature might have dispensed with the necessity of by prior statute, then a subsequent statute dispensing with it retrospectively must be sustained." *Cooley Const. Lim.* 371.

It may be admitted, perhaps, that a general law would be valid which authorized executors or administrators to obtain orders of sale on *ex parte* applications; or to sell real property, for the payment of debts, without notice to the heirs, or application to any court. Possibly also, a special law to the effect last mentioned (held not to be an exercise of judicial power in *Watkins v. Holman*, 16 Peters, 25) might not be a violation of any part of our Constitution, except the provision: "All laws of a general nature shall have a uniform operation." But it has been expressly decided in this state that the legislature cannot authorize a sale by an executor or administrator, except in satisfaction of the liens of creditors, or for the support of the family, or expenses of administration. *Brenham v. Story*, 39 Cal. 179. And when such prospective laws providing for a sale to pay debts have been sustained, it has been held that they decide no fact binding upon heirs, devisees of creditors; but as to them the executor or administrator acts subject to an accountability in a court of chancery for the correct performance of his trust in this as in other parts of his duty. 16 Peters, 62.

It may be doubted whether under our Constitution, which distributes the judicial power throughout a system of courts, the question of the existence or non-existence of debts, &c., could be referred to the district court, to be determined only when suit was brought by heirs or devisees to make the executor or administrator responsible for the abuse of his trust. However this may be, it is quite certain that the jurisdiction to inquire into the existence of debts may be, and by the general probate law has been placed in the probate court, and the effect of the statute of 1866—if it be held effective at all—is to make a void judgment valid.

We say, then, that the question as to the existence of debts, insufficiency of personalty, &c., and consequent necessity for a sale of real property, is a judicial question, and the legislature cannot decide it. If it be alleged, that the legislature has not attempted to decide it, the reply is, that the statute of 1866 has left to the heirs or devisees no defence against a title asserted by a purchaser at such sale, except actual fraud, or collusion between the purchaser and executor or administrator; that by its terms no remedy is given to the heirs or devisees against the executor or administrator personally; but, on the contrary, the very object of the statute, as claimed by appellants herein, is to validate the whole proceeding and to make it as effectual in law as if it had been conducted in precise compliance with the statutes; that, assuming the statute to be applicable to void judgments and sales, without reference to the existence of debts, and in spite of their non-existence. This the legislature was powerless to do, because, to apply the rule as laid down by Judge Cooley, "the thing wanting" was not a thing which the legislature "might have dispensed with the necessity of by prior statute."

If it can be said in any sense of the words, that the Act of 1866 is not the exercise of judicial power, it is only because there is provided in it no pretence of judicial inquiry, no day in court for the parties to be affected by it, no course of investigation, no saving of private rights, or recognition of the principles of distributive justice.

If for such reasons the statute is not an exercise of judicial functions,

then, as was said by the supreme court of Massachusetts, "It is certainly a violation of another fundamental principle of the Constitution. It takes from the subject his property, not by due process, or by the law of the land, but by an arbitrary exercise of the legislative will." *Denny v. Mattoon, supra*. Prior to 1848 the courts of Pennsylvania had often decided that a testator's "mark" at the foot of a testamentary paper was not a valid signature; had repeatedly construed their statute of wills as the California courts (prior to the Act of 1866) had repeatedly construed our statute relating to sales of lands by executors or administrators. To "overrule" these decisions, — as Mr. Sedgwick aptly expresses it (Stat. & Const. Law, 349), — the Legislature of Pennsylvania, in 1848, passed an act declaring that every will, theretofore made, to which the testator had made his mark, should be valid. In *Greenough v. Greenough (supra)*, Gibson, C. J., said: "How this mandate to the court to establish a particular interpretation of a particular statute can be taken for anything else than an exercise of judicial power in settling a question of interpretation, I know not." And in the same case: "The statute is destitute of retroactive force, not only because it is an act of judicial power, but also because it contravenes the declaration in the Constitution, that no person shall be deprived of life, liberty, or property, except by the judgment of his peers, or the law of the land."

Our conclusions are that the Act of April 2, 1866, is in conflict with the provision of the Constitution of the state, which prohibits the legislature from exercising judicial functions; that it also contravenes the provision that no person can be deprived of his property without due process of law; and that it is, therefore, void.

The purchaser "in good faith," mentioned in the statute, could only be one who bought in ignorance that the sale was invalid in law, and who in that respect was in the same position as are all who part with their money in ignorance of their legal rights. If he, or his assignee, shall complain of the hardship of losing the purchase price, it can only be said — however the fact may be regretted — that the hardship was suffered before the Act of 1866 was passed, and was the consequence of an existing rule of law and of his own ignorance of that rule. From September 19, 1853, to April 2, 1865, a period of nearly thirteen years, the purchaser, or his grantee, had no right, title, or interest in the land; and if he had any right of action against Foster or the heirs to recover the money paid, he did not assert it. The hardship, if any, therefore, is not inflicted by the act of this court in simply discharging its duty of declaring the statute of none effect.

*Judgment affirmed.*

## SUPREME COURT OF NEW HAMPSHIRE.

(To appear in 55 N. H.)

## MEASURE OF DAMAGE FOR LAND TAKEN FOR RAILROAD.

## ADDEN v. WHITE MTS. N. H. RAILROAD.

In awarding damages to the owner of land taken for a railroad, the exposure of his remaining land and buildings to fire from the company's engines is a proper element to be considered in making the estimate.

The statute which imposes upon railroad corporations an absolute liability for all damage caused by fires from their locomotives, does not necessarily preclude a recovery of anything for this cause; but the question is, How much will the property be diminished in value by reason of such exposure, considering at the same time the indemnity provided by the statute?

Benefits from the construction of a railroad, which the land-owner enjoys in common with the public generally, cannot be set off in reduction of his damages.

APPEAL from an award by the railroad commissioners and the selectmen of Northumberland of four hundred dollars for land damages.

The railroad was constructed over and across the appellant's land and in the vicinity of the track, and upon both sides of it was a growth of pine-trees. The defendants contended that by the construction and operation of the railroad the appellant derived advantages for getting his lumber to market, which advantages should be taken into consideration in diminution of the damages sustained by the appellant. The court instructed the jury that they must not set off against the land-owner's individual damages any incidental and general advantages enjoyed by him in common with the public generally; but if, by reason of the construction of the railroad over his land, the land-owner derived special and peculiar advantages, these may be set off at what they are worth against his loss and disadvantages; that if, by reason of laying the road through his land, the land-owner is afforded peculiar facilities and advantages in respect to his growing pine-trees, this advantage to him may be considered in estimating his damages. The track of the railroad was located at a distance of about one hundred feet from the end of the appellant's house. In the closing argument of the plaintiff's counsel to the jury, he claimed that they ought to take into consideration the enhanced expense required to insure the house against fire by reason of its proximity to the railroad, and requested the court to charge the jury to that effect; but no testimony had been introduced on either side concerning the matter of insurance, nor did it appear whether or not the appellant's house was ever insured, nor whether or not the rates of insurance would be increased by reason of the construction of the railroad. The court refused this request, and charged the jury that since, by the provisions of the Gen. Stats. ch. 148, sec. 8, the proprietors of a railroad are made "liable for all damages which shall accrue to any person or property by fire or steam from any locomotive or other engine on such road," no damages in respect to this matter could be allowed. To these rulings and instructions the appellant excepted. The jury awarded as damages four hundred and fifty dollars. Case reserved.

*Fletcher & Heywood*, for the plaintiff.

*Ray & Drew* (with whom was *Bingham*), for the defendants.

SMITH, J. The rule in regard to the assessment of damages for land taken for a public highway is well settled in this state. Nothing is to be deducted on account of benefits and advantages not peculiar to the owner of the land so taken, but which are general, and shared in by other land-owners in the vicinity. He is entitled to compensation, not only for the land actually taken, but for the damage to the whole tract through which the road passes, — which includes the diminished value of what is left. If the result of the construction of the highway is inevitably to raise the value of all the lands in the neighborhood, he is as much entitled to his share of the general advantages, without compensation, as others whose lands are not taken. To require him to offset such advantage against his damages for the taking of his land, would require him to bear a portion of the expense of the highway which should be borne by the public, and would be manifestly unequal. The rule is correct on principle, and is abundantly supported by authorities. *Carpenter v. Landaff*, 42 N. H. 218; *Petition of Mt. Washington Road Co.* 35 N. H. 184. The same rule is also adopted in Massachusetts. *Meacham v. Fitchburg Railroad Co.* 4 Cush. 291; *Upton South Reading Branch R. R.* 8 Cush. 600; *Whitman v. Boston & Maine R. R.* 3 Allen, 138; S. C. 7 Ib. 313; also in other states. Redf. on Railw. 2d ed. \*133, sec. ix. § 71, and authorities there cited.

This rule is equally applicable to a railway corporation as to a public highway. Railroad corporations are declared by statute to be public highways. Gen. Stats. ch. 146, secs. 1-3. A turnpike road is a public highway, differing from free roads only in the manner of use. All citizens may use a turnpike by paying the established toll. *Backus v. Lebanon*, 11 N. H. 24, cited by Perley, C. J., in *Pet. of Mt. Washington Road Co.* 35 N. H. 140, where it was held that "the power to take private property for public use may be exercised by the government through the means of a private corporation. The fact that the members have a pecuniary interest, such as will give it in law the character of a private corporation, will not prevent the state from using it to accomplish a public object."

In awarding full indemnity to the owner for land taken from him for public uses by authority of law, several elements are to be taken into the account. The diminished value of what is left is one very important fact. This diminished value may arise from several causes, such as the inconvenient separation of the track, rendering the buildings less commodious, interrupting the supplies of water for cattle or irrigation or household purposes, and the like; *Carpenter v. Landaff*, *ubi supra*; to which may be added the nearness of the track to the owner's buildings, the inconveniences caused thereby, and "the imminent and appreciable danger from fire," and the like. *Proprietors of Locks, &c. v. Nashua & Lowell R. R.* 10 Cush. 385; Redf. on Railw. 2d ed. \*155, note 10, and authorities cited.

The law does not afford indemnity for all losses occasioned by the laying out and use of a railroad, especially for such damages as are remote and consequential. They are damages not caused by the taking of the land for the road, but by the change which the public improvement intro-

duces into the course of business. It affords no protection against new competitions, nor against changes introduced by time and the progress of the age; *Pet. of Mt. Washington Road Co.* 35 N. H. 146, and *Proprietors of Locks, &c. v. Railroad*, 10 Cush. 389; nor does it afford relief against such inconveniences as "the whole community suffer alike, in a greater or less degree, and which are to be borne by the public in consideration of the greater public good to be acquired." *Ib.* 391. But whatever tends directly and substantially to diminish the value of the tract of land left to the owner, who has been compelled to part with the possession of a portion thereof for the public good, should be weighed and considered in awarding him his damages. That imminent and appreciable danger from fire does so diminish the value of his property, there can be no question.

The defendants' road is located one hundred feet from the plaintiff's dwelling-house. It is unquestionably material for the jury to consider whether his damages are not greater with the tract one hundred feet distant, than they would be at a distance of one hundred rods. The location of the tract, and all such matters as grow out of and are caused by the location, are proper matters for the jury to consider.

It is claimed here by the defendants that the plaintiff is insured by the statute, which in case of loss makes the defendants liable to the plaintiff; Gen. Stats. ch. 148, sec. 8; and therefore that the element of the enhanced cost of insurance should not be considered in awarding his damages. But I think this does not follow. His buildings may never burn. If they do not, of course the railroad cannot be called on to pay. But is the plaintiff to go without insurance because the railroad is made liable? It is the part of prudence for one to keep well insured. Is the owner compelled to rely on the railroad? Suppose the road happens to be insolvent, as many railroads are, where would be his security? Suppose, in case of loss by fire of his buildings, the railroad contest their liability on the ground that the fire did not originate from their locomotives; it is often not only difficult, but impossible, to prove the origin of a fire. The liability of the railroad extends only to fires caused by their locomotives or engines. Gen. Stats. ch. 148, sec. 8.

It cannot be successfully contended that the owner is not entitled to insurance against fire which may happen from *any* cause; and if he is unable to obtain such insurance without paying a higher premium therefor because of the increased danger resulting from the proximity of the railroad track to his buildings, that surely must constitute an appreciable and serious detriment to the owner. The rate of insurance being increased operates proportionally to diminish the value of the rent and of the buildings. *Redf. on Railw.* \*155, note 10.

It is no sufficient answer to say the owner might purchase a policy at the usual rate by agreeing to the insertion of a clause exempting the insurance company from liability in case of loss or damage by fire occasioned by the locomotives of the railroad company. To say nothing of the difficulty he might encounter in procuring such a policy, or of the mistakes and misunderstandings that would naturally ensue, it would very likely end in litigation, the railroad on the one hand denying their liability, and the insurance company on the other claiming that the fire originated from the railroad company's engines; and so the owner, in addition



to having lost his property by fire, would be placed between two other fires where the result might prove equally disastrous.

By section 10, any insurance effected by the owner enures to the benefit of the railroad company in case of loss occasioned by them, so that the owner receives no advantage from his insurance in case of payment by the railroad company of his damages; and unless the company do pay, he has only been able to procure partial indemnity for his loss by paying an increased premium therefor. This section applies not only to the owner whose land has been taken in the construction of the road, but to any person whose property may be damaged by fire from the company's engines; and there would seem to be equal reason for claiming that no one whose property is located on the line of the road need protect it by insurance because the railroad is made liable in case of loss by fire from its engines, as to claim this in behalf of the owner whose land has been taken by the road in its construction. The danger of loss by fire communicated from the company's engines is only one of the many dangers from that source that threaten the owner's property; but owing to the proximity of the track to his buildings, he cannot protect them from this source of danger except at a price enhanced in consequence of this act of the defendants.

That no evidence was laid before the jury upon the subject of insurance does not alter the aspect of the question. The jury were instructed that no damages on account of increased insurance should be allowed; and the only conclusion we can draw is, that none were allowed on that account. I think the instructions were erroneous upon this point.

The instructions in regard to any peculiar advantage which the plaintiff might acquire from the construction of the road seem to recognize as a fact, that the facility thereby afforded him for transporting his pine-trees to market was in itself an advantage of that peculiar character that would require him to offset such advantage against his damages for the land taken. Giving a land-owner access to his land where he had none before would not ordinarily be considered a benefit for which he should pay, but rather in the light of a general improvement in which many would share. See *Carpenter v. Landaff*, *supra*, 224, where Bellows, J., remarked: "It is true that there may be cases where a single land-owner would be furnished such access where none existed before; but ordinarily it would be otherwise, and the cases would be extremely rare when many were not benefited by improved means of access. Indeed, such a state of things could hardly be expected at all, unless in a case of a private road."

The fact that the road gave the plaintiff access to his trees was not in itself such a peculiar advantage as to require him to submit to a reduction of his damages on that account. It does not appear but what others in the vicinity, whose land was not taken, were benefited in the same manner if not to the same extent. The instructions were not sufficiently explicit upon this point.

For these reasons I think the verdict must be set aside.

CUSHING, C. J. The question is, whether by our law there can be any circumstances which ought to be taken into consideration showing some advantages derived by the proprietor, which ought to be set off against any portion of the damages to which the landholder would otherwise be

entitled. There are certain cases which have been decided in which it has been intimated that such a state of facts might exist, but I do not think that principle has often, if at all, been made the basis of a judgment and a reason for the allowance of such set-off.

All the cases seem to recognize the principle, that no reduction of damages is to be made by reason of any benefit derived to the landholder, belonging to the same class of benefits as are shared in common by all the landholders in the vicinity. If there be any case for such set-off, it must be an exceptional one.

Now, it seems to me that if there be any class of benefits which is emphatically shared by all, it is that class which has its origin in increased facilities for transportation. One man is enabled to get his pine timber to market, another opens his granite quarry, a third may have a large grass farm, and finds increased facility for taking his pressed hay to market. These facilities are greater or less in proportion to the proximity of the land to the railroad or the station, but they all belong to the same class. They all belong to the class of general benefits, which is open to all and shared alike by all.

I think therefore that the charge, in recognizing, as I think it does, that the fact of the pine timber existing on the line of railroad is exceptional, and the benefits derived from it peculiar, was erroneous. It is true that in the end it would be a question of fact whether or not, under the existing circumstances, there was an exceptional benefit. But I think that lot of pine timber, standing near the track, was in itself no more exceptional than a turnip field or a grass meadow, and that the jury should have been so instructed.

It seems to me, also, that there was error in the instruction of the court in regard to the insurance. The fact that the buildings were near the railroad was before the jury, and that in itself was evidence from which they might form some judgment as to the risk of damage from the fire. It seems plain enough that the legal liability of the railroad corporation to indemnify against damages by fire from their engines was a very poor substitute for insurance. Seeking an indemnity from a railroad corporation, taking upon one's self the burden of showing that the loss was occasioned by fire from the engine and not by any of the other numerous means by which fire might be occasioned, is quite a different thing from seeking indemnity from an insurance company. The responsibility of railroad corporations, too, taking them one with another as railroad corporations exist in the country, is a very different thing from the responsibility of such an insurance company as the party may himself see fit to select. It was, therefore, a question of fact, which might well have been submitted to the jury, whether, under all the circumstances, the increased danger of fire from the engines could be so balanced by the liability of the corporation as to leave no diminution in the value of the property.

LADD, J. The land-owner is entitled to compensation for such damage as will result to him from the proper construction, maintenance, and operation of the road over the land taken for that use; and I am of opinion that exposure of his remaining land, whether occupied by buildings or not, to fires by the company's engines, is a proper element to be considered in making the estimate. 1 Redf. Railw. ch. xi. secs. 74, 82, and cases in notes.

This being so, the question is, whether the statute imposing an absolute liability upon the company to pay all losses occasioned in that way necessarily covers the whole ground so as to leave nothing for estimation on that score; and I think it does not.

Our statute on this subject is in effect identical with that of Massachusetts. In *Peirce v. W. & N. Railroad Co.* 105 Mass. 199, Colt, J., says: "It is plain that this indemnity [that furnished by the statute] is not so perfect and complete as to preclude, in the estimate of damages, a consideration of the direct effect of a constant liability to destruction by fire from this new source upon the present value of a dwelling erected upon the remaining portion of the estate, as a safe and comfortable residence, or for purposes of sale. The present value of the property must be to some extent depreciated, although there is a chance that the buildings may never be destroyed by fire, and although, if they are, it is certain that the owner, whoever he may be, will be indemnified under the statute for the actual loss he sustains. The injury to be measured in the assessment of damages occasioned by the location of the railroad, in this respect at least, is broader than the indemnity of the statute."

It is argued that the facts shown on the trial did not call for or warrant the instructions requested, inasmuch as there was no evidence as to insurance one way or the other. But the exception was to the instruction given, as well as to the refusal to give those requested; and I think the only just interpretation that can be put upon the case as reported is, that the jury and counsel, as well as the court, must have understood that no damages could be given on account of exposure to fire from this source by reason of the indemnity for actual loss furnished by the statute, to the provisions of which the attention of the jury was specially directed by the court. I think this was erroneous, and that this exposure was proper matter for consideration by the jury, of course under proper instructions as to making due allowance for the indemnity provided by the statute.

The general proposition given to the jury, as to special benefits to the land-owner arising from the construction of the railroad, were clearly correct; but I doubt the correctness of their application upon the facts reported. How do the facilities afforded the appellant with respect to his growing pine-trees standing on land adjacent to the railroad, and the consequent benefit to him, differ in kind from the advantages and benefits enjoyed by all other owners of similar lands in the neighborhood? It seems to me at most a mere matter of degree, dependent upon the distance of such lands from a station or turn-out on the proposed road. If it had appeared that the company had constructed, or bound themselves to construct, a turn-out or side track for the special accommodation of the appellant in getting his pines to market, a different case would be presented. As it is, I am inclined to the opinion that this was not a case where the jury was authorized to make any deduction on account of supposed special benefit to the land-owner. See remarks of Perley, C. J., in *Pet. of Mt. Wash. Road Co.* 35 N. H. 147.

*Verdict set aside.*

## COURT OF APPEALS OF MARYLAND

(To appear in 41 Md.)

## DEED BY HUSBAND IN FRAUD OF RIGHTS OF WIFE. — EVIDENCE.

## SANBORN v. LANG.

On a bill by a widow against the grantee in a voluntary deed from her husband of nearly the whole of his property, to have such deed declared fraudulent and void as against her rights, she is competent to testify as to what passed in an interview between herself and the defendant, and as to certain letters from him to her husband found in his desk after his death.

In a proceeding to have a deed declared fraudulent and void as against the rights of the widow of the grantor, his declarations to the conveyancer with respect to the deed, and his object and purpose in making it, being contemporaneous with its preparation and execution, are admissible in evidence.

A married man by a deed voluntary and without valuable consideration, conveyed nearly the whole of his property to his nephew. To the conveyancer who prepared the deed, he stated that his purpose was to deprive his wife of the property. The deed was executed on the 20th of May, 1872, and recorded the same day in Baltimore. The grantee lived in New Hampshire, and never had possession of the deed till after the death of the grantor in July, 1873. Before the deed was executed, a power of attorney was sent to the grantee and executed by him in New Hampshire, by which the grantor was authorized "to sell and convey, mortgage, or otherwise dispose of the property." In August, 1872, the grantor wishing to borrow \$1,000 for his own use, one of the pieces of property mentioned in the deed was mortgaged to secure it. The mortgage and notes were sent to the grantee and by him were executed. The grantor remained in possession of the property embraced in the deed, until his death. On a bill filed by the widow against the grantee, to have the deed declared void as in fraud of her rights, it was *Held*, that the deed was not made *bonâ fide*; but as to the complainant was fraudulent, and could not operate to deprive her of her legal rights as widow and distributee.

## APPEAL from the circuit court of Baltimore City.

The bill in this case was filed by the appellant, the widow of David M. Sanborn, and Martha P. Hood, his only child, against the appellee residing in New Hampshire. The object of the bill was to have a deed from the deceased to the appellee, made, as expressed upon its face, for good and valuable consideration, and the sum of five dollars, declared fraudulent and void, as against the complainants. The bill averred that the said David M. Sanborn departed this life in the city of Baltimore, on the 24th of July, 1873, intestate, seised and possessed of certain real and personal estate, to the value of \$5,000; that the appellee, a resident of New Hampshire, pretended to be seised of said property by virtue of a deed to him from the said David, dated the 20th of May, 1872; that said deed was without a valuable consideration, and as against the complainants, and the creditors of the said David, was fraudulent and void; that it was made in contemplation of the death of the grantor, and with the avowed and express intent, design, and purpose of depriving the complainants of their distributive shares of the estate of the deceased.

The bill further charged that the appellee had come to Baltimore from his home in New Hampshire, and was making extraordinary efforts to sell and dispose of the property in question, in order to defraud the com-

plainants and creditors of their just rights in the premises; that letters of administration would be taken out on the personal estate of the deceased in a few days; and that the complainants were advised that after the payment of the debts of the deceased by the administrator to be appointed, they would be entitled to the balance of the estate of said deceased. The bill prayed that the defendant should answer under oath; that the deed to him might be declared null and void; and that an injunction might issue restraining the defendant from selling, conveying, mortgaging, incumbering, or in any manner disposing of the property aforesaid.

The defendant answered, denying all fraud and deceit as charged in the bill, and affirming that the deed to him was in every respect *bona fide*, and for a good and valuable consideration. He admitted that the appellant had a dower right in the ground rent, issuing out of one of the pieces of property embraced in the deed, and charged that she had received her thirds thereof since the death of her husband; that before and since the execution of the deed, the respondent had been assisting the deceased whenever he desired money, and that since the execution of said deed, he had mortgaged the leasehold property embraced therein, for the express purpose of raising \$1,000 for the deceased, and that the sum so raised had been paid directly to him; that said property remained charged with said sum and interest, which the respondent would be compelled to pay at the maturity of the mortgage. The answer denied that the deed was made in contemplation of the death of the grantor, or for the purpose and intent to deprive the complainants or either of them of their distributive share in his estate. It charged that the deceased had in bank, at the time of his death, some four or five hundred dollars, and his household furniture and other property and debts were in the hands of his administrator, more than sufficient to meet any claims against the estate of the deceased, and leave a good support to his widow. A general replication was filed to the answer, and testimony was taken to support the allegations of the bill. A further statement of the case is contained in the opinion of the court. By direction of counsel the bill was dismissed as to Mrs. Hood. The circuit court (Pinkney, J.) passed a decree dismissing the bill. From this decree the present appeal was taken.

The cause was argued before Bartol, C. J., Stewart, Grason, Miller, and Robinson, JJ.

*Richard Hamilton*, for the appellant. A court of equity will defeat any conveyance by which a husband seeks to deprive his wife of her marital rights in his estate, after his death. *Smith v. Fellows*, 2 Atkyns, 62; 7 Viner's Abridgment, 202; *Faireheard v. Bowers*, 2 Vernon, 202; 2 Roper on Husband & Wife, 14; *Griffith v. Griffith*, 4 H. & McH. 101.

The deed to the defendant in this case was executed by the grantor without a valuable or good consideration, and for the express purpose and design of depriving his widow of her share of his personal estate, and must be set aside as a fraud upon her rights. *Hays v. Henry*, 1 Md. Ch. Dec. 337; *Dunnock v. Dunnock*, 3 Md. Ch. Dec. 140; Roberts on Fraudulent Conveyances, 48.

One of the badges of fraud in this case is the fact that the husband

retained the possession of the property after the transfer of the title, and up to the time of his death. *Hays v. Henry*, 1 Md. Ch. Dec. 337; *Smith v. Fellows*, 2 Atkyns, 62, 377; *Hall v. Hall*, 2 Vernon, 276.

The right of a wife to a support from her husband is a legal liability, and a conveyance to defraud her of it is void, under the Statute of Elizabeth, as made to defraud creditors, she being a creditor under that statute. *Feigley v. Feigley*, 7 Md. 537; *Smith v. Fellows*, 2 Atkyns, 62; *Fairebeard v. Bowers*, 2 Vernon, 202.

In order to sustain the deed as a voluntary instrument, the *onus probandi* is upon the grantee. If there be a reasonable doubt the deed must fail. *Worthington v. Shipley*, 5 Gill, 460.

The declarations of the deceased about the deed were admissible in evidence. The declarations of a fraudulent grantor to a conveyancer at the time of preparing the deed, though made out of the presence of the grantee, are admissible as part of the *res gestæ*, to show the intention with which it was made, as also prior and sometimes subsequent declarations of the grantor, concerning the deed, when it is assailed by creditors under the statute of frauds. *McDowell v. Goldsmith*, 6 Md. 319; *Curtis v. Moore*, 20 Md. 93.

Where a party is in condition to produce proof, and does not produce it, the presumption against him is absolute. *Gresley Eq. Ev.* 471, 487; *East India Co. v. Donald*, 9 Ves. 280, 281; *Lupton v. White*, 15 Ves. 441.

The mortgage whereby the deceased raised \$1,000, and the power of attorney giving him power to sell or dispose of the property (not being contradicted), are absolute proof of a contrivance or design on the part of the deceased to cheat the laws respecting intestacy, and that it was not his intention to make a gift, but merely to defraud his widow at the time of his death.

*James W. Denny*, for the appellee. The bill of complaint in this case does not charge the grantee in the deed with any wrong whatever, and therefore as to him it must be presumed to be *bonâ fide*, as his answer affirms.

The exceptions to the testimony are well taken. The same is inadmissible; and, if even admissible, is mere conjecture, and totally insufficient to vacate an absolute deed made by the husband of the appellant fourteen months before his death. *Cooke v. Cooke's Ex'r*, 29 Md. 538; *Jones v. Jones*, 36 Md. 453.

This is not a creditor's bill, and the Statute of Elizabeth, made for the protection of creditors, cannot be applied as the law of the case. The appellant only became entitled on the death of her husband to the "widow's share" after "*all his debts were paid*," under the statute of distribution. Code, art. 93, secs. 120, 125; Code, Husband & Wife, sec. 5; *Lightfoot v. Colgan*, 5 Munford, 42.

If Dr. Sanborn conveyed the property to Lang, and the deed was executed, acknowledged, and recorded according to law, then it is immaterial whether the same was for value or merely voluntary. *Williams v. Banks*, 11 Md. 198; *Hays v. Henry*, 1 Md. Ch. Dec. 341.

If Dr. Sanborn has completely divested himself of his entire interest, and done all that was necessary to complete the grantee's title, then the

deed must stand as against the widow, even if made with intent to deprive her of a distributive share in his personal estate. *Dunnock v. Dunnock*, 3 Md. Ch. Dec. 140; *Feigley v. Feigley*, 7 Md. 537; *Lightfoot v. Colgan*, 5 Munford, 42-77; *Cameron v. Cameron*, 10 Sm. & Mar. 894; *Stewart v. Stewart*, 5 Conn. 317; *Holmes v. Holmes*, 3 Paige, 863; 2 Roper on Husband & Wife, 17, 18; *Hall v. Hall*, *supra*; *Ingram v. Phillips*, 5 Strobbart's Rep. 206.

Under our registry laws, the recording of the deed fourteen months before the death of Dr. Sanborn was sufficient notice of possession, and gave to the grantee the *jus disponendi*, and the absolute control over the property, which control he has exercised from the date of the deed to the present time. *Williams v. Banks*, *supra*, 198; *Mayor, &c. of Balt. v. Williams*, 6 Md. 235, and note on page 272; *Sexton v. Wheaton*, 8 Wheaton, 229; Bump's Fraud. Conveyances, 160, and cases cited; 1 Story's Equity, sec. 403.

BARTOL, C. J., delivered the opinion of the court.

An examination of this case has brought us to a different conclusion from that expressed by the judge of the circuit court. This proceeds, we think, more from a difference of opinion with regard to the facts of the case, as they are disclosed by the record, than from any conflict between us as to the legal principles involved in its decision. These were stated with substantial accuracy by the late Chancellor Johnson, in *Hays v. Henry*, 1 Md. Ch. Dec. 837.

In *Feigley v. Feigley*, 7 Md. 538, the court of appeals had under consideration the question of the restraints imposed by law upon the power of the husband to alienate his property, to the prejudice of his wife's just claim to her maintenance and support; and of her right to assail voluntary conveyances made by him on the ground of fraud.

The question arose in this way. The wife had filed a bill praying for a divorce *a vinculo*; pending the suit, the husband made a voluntary deed, conveying his property to his sister; which the complainant, by a supplemental bill for alimony, alleged to be merely fictitious, not intended really to deprive the grantor of the benefit of the estate, but only to save the same for his own benefit; and prayed that the deed be declared null and void, as fraudulent against her.

The court held that the wife stood in relation to her husband, in reference to her claim for a support and for alimony, to some extent, in the same attitude as a creditor stands towards his debtor; and that she was entitled to protection under the Statute of Elizabeth, against conveyances made by him fraudulently for the purpose of hindering, delaying, or defrauding her of her just and lawful actions. *Ib.* p. 561.

The court said, speaking by Judge Mason, who delivered the opinion: "We do not wish to be understood as carrying this doctrine to an extent which would impose any restraint upon the husband, in the free and unlimited exercise of his right to alienate his property at will, even though in the exercise of this right he strips himself of all means of supporting or maintaining his wife, provided he does so *bona fide*, and with no design of defrauding her of her just claims upon him and his estate; the fraudulent intent in all such cases being the true test of the validity of the transaction. *Ricketts v. Ricketts*, 4 Gill, 105. There is this difference

between the claim of a wife upon her husband's estate, and that of a creditor upon the estate of his debtor : in the latter case a debtor cannot, even by a *bond fide* gift of the whole, or a part of his property to a third person, impede his creditor in the collection of his debt. Under such circumstances, such a transfer would be voluntary, and, as against a *bond fide* creditor, void in point of law. Not so as respects the gifts or voluntary transfers by a husband of his property, in relation to the rights of his wife. If not made with the *actual intent* of defeating the rights of his wife, they will be sustained, although they leave her without the means of subsistence." We have quoted the language of the court at some length, because it expresses clearly the principles of the law, as it is settled in this state, applicable to the delicate and intimate relation between husband and wife, as respects her rights with regard to his property, and her protection against alienations made by him during the coverture, for the purpose of defrauding her claim upon him for maintenance and support.

In that case, her claim was asserted during his life ; but it rests upon grounds very analogous to those asserted by the appellant, in support of her bill impeaching the deed of her late husband, to the appellee, dated the 20th day of May, 1872.

To ascertain the intent and purpose with which the deed was made, we must refer to the facts and circumstances attending its execution, and the acts and conduct of the parties, as disclosed by the evidence ; and the first question to be determined arises upon the exceptions to testimony filed by the appellee. These are : —

1st. To the competency of the complainant as a witness under the Acts of 1864 and 1868.

2d. To the admissibility of conversations between the witness and the deceased after the deed was executed.

3d. To the letters of the appellee, and especially that dated May 26, 1874 (marked Ex. No. 4), as not proved.

4th. To the 10th and 13th questions to the witness Fowler, as leading and otherwise objectionable.

5th. To the conversations between the deceased Sanborn and the witness Reynolds, as testified to by the latter, — which took place after the execution of the deed.

1st. We see no valid legal objection to the competency of the complainant, Mrs. Sanborn, under the Evidence Acts of 1864 and 1868. She does not fall within the exceptions in the Act of 1868, ch. 16, as interpreted in *Jones v. Jones*, 36 Md. 457 ; *Dennison v. Dennison*, 35 Md. 381, and *Johnson v. Heald*, 38 Md. 352.

This is not a suit with an executor or administrator, touching a claim for or against the estate of a decedent ; nor is it a suit upon, or relating to a contract to which the witness was a party, the other party being dead. In our opinion, Mrs. Sanborn was a competent witness, with respect to the matters upon which she was called to testify.

2d. We discover nothing in her testimony, to which the second exception can apply.

3d. Mrs. Sanborn being a competent witness to testify on that point, her evidence sufficiently proved the letters referred to in the third exception.



4th. The 10th and 13th questions asked of the witness Fowler are not obnoxious to the objection of being leading. The testimony given in response thereto was to the declarations of the grantor with respect to the deed, and his object and purpose in making it; and being contemporaneous with its preparation and execution, was clearly admissible.

5th. As to the declarations of the deceased made to the witness Reynolds, after the deed was executed, we rule them out as wholly immaterial, without stopping to express any opinion, whether they were not inadmissible on other grounds.

We proceed now to state our conclusions upon the material facts of the case, as established by the proof.

They are, 1st. That the deed was merely voluntary, that no valuable consideration for it was given by the appellee. This is abundantly shown by the testimony of Mr. Fowler, the conveyancer, as well as by the letters of the appellee, from which it appears that as late as August 28, 1872, he had never seen the deed, and was ignorant of its terms and contents.

Besides this, there is an absence of proof on his part, of any consideration, the evidence of which, if he had paid any, must have been in his possession. *Shaferman v. O'Brien*, 28 Md. 575, 576.

And we may add, as quite conclusive on this point, that the appellee, in his conversations with the witnesses, Mrs. Hood and Mrs. Sanborn, while he asserted that he had given value for the property, did not pretend to name any other consideration, except the mortgage of \$1,000, which was executed by him, upon the property, on the 28th day of August, 1872, at the instance of Sanborn, to secure the payment of that sum borrowed by him. Doubtless it was with reference to that transaction, that he considered himself justified in stating in his answer, that he had paid a valuable consideration for the deed. But the mortgage was not given till long after the deed was recorded, and was not in contemplation when it was executed. In no sense could the giving of the mortgage constitute any consideration for the deed. Beyond all doubt or question, the deed of the 20th of May, 1872, was wholly voluntary, a mere gift, made without any valuable consideration whatever passing from the appellee.

2d. It is conclusively shown by the proof, that the purpose and design of Sanborn in executing the deed was to deprive his wife of the share of his estate, to which she would be entitled by law, at his death.

He had been informed by his friend and attorney, Mr. Reynolds, that this purpose could not be accomplished by making a will; and hence, his application to Mr. Fowler, the conveyancer, to have the deed prepared, stating at the time that "his object was to deprive her of the property."

3d. Our conclusion from the whole evidence in the cause, especially from the circumstances attending the execution of the deed, and the powers of attorney; and the conduct of the parties afterwards with reference to the property, that their real purpose and intent were that the beneficial interest should not be claimed by the appellee till after Sanborn's death. While he lived, the substantial ownership of the property with the control and dominion over it remained with him.

The deed was executed on the 20th day of May, 1872, and recorded the same day in Baltimore; the grantee lived in New Hampshire, never had possession of the deed till after Sanborn's death in July, 1873. Be-

fore the deed was executed, a power of attorney was sent on to the appellee and executed by him in New Hampshire, on the 18th day of May, 1872.

By that power of attorney, Sanborn was authorized, "*to sell and convey, mortgage, or otherwise dispose of the property.*" In August, 1872, wishing to borrow \$1,000 for his own use, one of the pieces of property mentioned in the deed was mortgaged to secure it. The mortgage and notes were sent on to the appellee to be executed, which was done as a matter of course. The correspondence between the parties shows that the appellee considered that Sanborn had the right to deal with the property as his own. We do not agree with the judge of the circuit court, in the construction of the appellee's letter of August 28, 1872. While the writer was evidently solicitous about the personal liability he incurred upon the notes, he expressed no concern about the property. It is apparent from the letter, that he did not question the right of Sanborn to do with the property as he pleased, provided he was saved from pecuniary loss.

It is evident also that up to that time the appellee had never seen the deed, and was ignorant of its contents, relying altogether upon the representations of Sanborn.

The facts that the power of attorney was prepared at Sanborn's instance, and sent on to be executed before the deed was made; that it secured to him the unlimited right of disposing of the property as owner; that he did so deal with it by having a portion of it mortgaged to obtain money for his own use, and that he remained in possession of it till his death, which occurred in July, 1873,—conclusively show that though the deed was absolute on its face, the intent and purpose of the transaction, and of the parties, was that while Sanborn retained dominion and control over the property in his lifetime, his wife should have no part or share of it after his death.

This being so, the case falls directly within the principles laid down by the chancellor in *Hays v. Henry*, 1 Md. Ch. Dec. 387; and in *Feigley v. Feigley*, 7 Md. 561.

The deed was not made *bond fide*, but as respects the appellant was fraudulent, and cannot operate to deprive her of her legal rights as widow and distributee.

The rights of the appellant are not affected by the recording of the deed and the power of attorney. She had no actual knowledge of their existence till she was informed by the appellee, when he came on to Baltimore to take possession of the property after her husband's death.

So far as appears from the evidence the appellant faithfully performed her duties toward her aged husband as long as he lived. In this respect, there is nothing in the testimony to afford any moral justification or excuse for his extraordinary conduct; and we cannot refrain from expressing our gratification, that the law affords her relief and protection against the attempted fraud upon her rights.

The decree of the circuit court will be reversed and the cause remanded, in order that a decree may be passed declaring the deed of May 20, 1872, null and void, so far as the appellant is concerned, and that she may be relieved against the same, in conformity with the opinion of this court.

*Decree reversed, and cause remanded.*

## CIRCUIT COURT OF THE UNITED STATES. — MIDDLE DISTRICT OF ALABAMA.

## YOUNG v. THE RAILROAD COMPANY.

- (1.) It is unnecessary to aver matter of law or public statute, of which the court takes judicial notice.
- (2.) Where a state is concerned in the subject matter of the suit it should be made a party, if that can be done; but the fact that the state cannot be sued is a sufficient excuse for not making it a party.
- (3.) Where a state was an indorser of bonds secured by a statutory mortgage, it was not considered a necessary party, in a suit brought by holders of bonds secured by the mortgage, to foreclose the same.
- (4.) A state indorsed the bonds of a railroad company, and was indemnified against loss on account of the indorsement by a statutory mortgage on the railroad property; *held*, that the fact that the state could not be sued was no reason why the holders of the bonds so indorsed should not be subrogated to the rights of the state and have the benefit of the security.
- (5.) An act of the legislature authorized the governor to indorse in behalf of the state the first mortgage bonds of a railroad company, bearing interest at the rate of eight per cent. per annum; the governor indorsed the bonds, and referred to the act in his indorsement as the authority therefor: *held*, (a) That the act authorized the indorsement of bonds bearing interest at eight per cent. per annum in gold. (b) That *bonâ fide* holders for value, of the bonds indorsed by the governor assuming to act under said authority, were not to be charged with constructive notice of the fact that the bonds so indorsed were not first mortgage bonds.
- (6.) An act, passed subsequent to the one authorizing the indorsement of the said bonds, gave authority to the governor to indorse the bonds of the railroad company, notwithstanding there was a prior lien on said company's railroad, but it was claimed that this law did not pass the legislature by the vote required by the Constitution, and was therefore null and void; yet that it was nevertheless constructive notice to the bondholders of the fact that the bonds owned by them were not first mortgage bonds: *held*, that if this enactment were valid, it cured any defect in the authority of the governor to indorse the bonds, and that if it were not valid but void, it was not constructive notice to anybody of anything.
- (7.) When a court having jurisdiction of a case has appointed a receiver for the property which is the subject of the suit, and he is in possession, no other court of co-ordinate jurisdiction can interfere with the property, or entertain complaints against the receiver, or undertake to remove him.
- (8.) Junior mortgagees may file a bill to foreclose their mortgage without making prior mortgagees parties, but a sale in such a case would necessarily be made subject to the prior mortgages.
- (9.) In such a suit the prior mortgagees can be made parties only by service of process or voluntary appearance. A general notice calling upon them to present their claims will not make them parties or bind them.
- (10.) If however such prior mortgagees are represented by trustees who are actual parties to the suit, then a notice calling upon them to present their claims before the master would be effectual, and the decree of the court would bind them.
- (11.) When junior mortgagees have first brought their suit to foreclose, and the court has taken possession of the mortgaged property by a receiver, the senior mortgagees cannot gain possession of the property by a suit subsequently begun until the first suit is ended.

THIS was a cause in equity which by consent was heard at chambers in Mobile, in June, 1875, on demurrer to the bill.

Messrs. Geo. W. Stone, David Clopton & James T. Holtzclaw, for complainant.

Messrs. Samuel F. Rice, D. S. Troy & H. C. Tompkins, contra.

WOODS, Circuit Judge. The defendant company is an Alabama corporation, which has constructed and equipped a railroad from Montgomery to Eufaula in said state. The case made by the bill is substantially as follows:

The complainants are holders of certain bonds belonging to a class of bonds issued by the defendant railroad company and indorsed by the State of Alabama; twelve hundred and eighty of these bonds, for \$1,000 each, were issued, indorsed by the state, and put in circulation, and the indorsement was put upon said bonds before they were disposed of by the railroad company. One thousand of these bonds bear date the 31st of August, 1867, and are payable on the 1st day of March, 1886. To each of these bonds are attached coupons, thirty-seven in number, one on each bond for the payment of \$40 in United States gold coin, on the first day of March, 1868, and others severally for the payment of a like sum in like coin at the end of each six months thereafter, until the bonds themselves became due. The other two hundred and eighty bonds are substantially like the thousand bonds first named, with a like indorsement, but the date of these bonds and the date of their maturity is not stated in the bill.

The indorsement upon these bonds is in these words: "In pursuance of an act of the Legislature of the State of Alabama, approved February 19, 1867, entitled, an act to establish a system of internal improvements in the State of Alabama, the undersigned governor of the state, hereby for the state, indorses this bond and makes the state liable for its payment; the Montgomery & Eufaula Railroad Company having complied with the conditions upon which the undersigned is required on the part of the state to give such indorsement. In witness whereof, the undersigned, Governor of the State of Alabama has hereunto set his hand this — day — 1866. (Signed) R. M. Patton, Governor of the State of Alabama."

All of these bonds bear date before the first of March, 1873, but may have different dates and the indorsement of different governors, and are numbered serially from one up to twelve hundred and eighty.

The bonds held by complainants were sold before March 1, 1873, at not less than ninety cents on the dollar, and were put in circulation, and complainants became the owners of such of said bonds as are specified in a schedule annexed to the bill *bond fide* and for a valuable consideration, and the bonds held by complainants amount to \$215,000.

No mortgage was executed by the railroad company to secure these bonds, the company being advised by its counsel that no mortgage was necessary.

No interest has been paid to the complainants on their bonds since the first day of September, 1872, and the railroad company is, and for more than two years has been, insolvent.

The railroad and its property is, and for a long time has been, in the possession and control of the defendant Andrew J. Lane, who by virtue of an appointment made in a suit brought by Samuel A. Strong against the said railroad company in the interest of certain persons, claiming to be second mortgage bondholders; such suit is pending in the circuit court of the United States for the Southern District of Alabama. The bonds on which that suit is based show upon their face that they are second mortgage bonds, and that the mortgage by which they are secured is subject to

the prior lien of the series of 1,280 bonds before mentioned, part of which complainants hold; and the bill of complaint under which said Lane holds as receiver admits the prior lien of said 1,280 bonds.

It is charged that Lane at the time of his appointment as receiver was, and long before had been, the president of the said railroad company, and was a large creditor thereof, was interested as a stockholder, and as a holder of a large number of said secured mortgage bonds.

It is alleged that the answer of the railroad company to the bill filed by Strong was dictated by Lane; that he was appointed receiver on the same day the bill was filed; that he was authorized to take possession of the road and property of the railroad company and manage and run it; and, on application to and approval of the court, to borrow money on his certificates, for the purpose of repairing and running the property of the company; that on the 15th day of July, 1872, he applied to the court for leave to borrow \$60,000, which was granted on the 19th of July, 1872.

It is alleged that on the 31st of January, 1873, he applied to the court for authority to pay Lehman Dunn & Co., bankers, the sum of \$12,202.09, which the company paid to the appellant. Lane as receiver had overdrawn, in order to meet taxes and executions, which would have stopped the operations of the road, and the court ordered him to make the payment out of the earnings of the road.

The bill alleges, on information and belief, that Lane has filed no reports or accounts; and that a report made by him to the bondholders shows that he has expended the money borrowed by authority of the court, for other and different objects than those authorized by the orders of the court. (I may say in passing that I have read the report referred to, which is alluded to in the bill as Exhibit No. 5, and it totally fails to sustain the allegations of the bill.) Other complaints are made of the receiver Lane, that he has applied to the court and obtained orders which the court ought not to have granted.

The bill alleges further that the complainants cannot learn from the report of Lane, the receiver already referred to, whether the railroad has realized any, and if any what net profits. It alleges that the South & North Alabama Railroad Company, by petition, had itself made a party defendant, and has filed a cross-bill in the said suit of Samuel A. Strong, in which it claims that it has a first lien upon said railroad for many thousand dollars, but complainants aver that by virtue of the laws of Alabama, under which the bonds held by them were indorsed, their bonds are the first and best lien on the road, complainants having purchased their bonds without notice of any older lien.

It is further alleged, "that leave has been obtained from Hon. W. B. Woods, one of the justices of the circuit court of the United States for the Southern District of Alabama, to bring suit against the said Andrew J. Lane, receiver, in the circuit court for the Middle District of Alabama, on the claims of complainant hereinbefore set forth." Such are the averments of the bill.

The Montgomery & Eufaula Railroad Company, the South & North Alabama Railroad Company, the said Andrew J. Lane, receiver as aforesaid, and William Fowler and Thomas Pullum, who are averred to be the trustees of the second mortgage executed by said Montgomery & Eufaula

Railroad Company, are made defendants to the bill; and the prayer of the bill is, that this court will remove and take the said railroad and all the property and assets of the company and its control and management out of the custody and direction of the said Andrew J. Lane; that complainants and all others in similar rights with them, who will come in and contribute to the expenses of the suit, may be subrogated to the lien and rights of the State of Alabama upon the property and franchise of said railroad company, and said lien established and purchased; that the property and effects of the said company may be administered in this court, and said property and assets and its income and profits be appropriated by sale or otherwise to the interest due on the bonds held by complainants and others in similar right; and that an account may be taken of the proceedings and administration of said Lane, &c., and for general relief.

In order to understand clearly the case made by the bill, it is necessary to refer to the Act of the State of Alabama of February 19, 1867, as subsequently amended, by virtue of which the governor indorsed the bonds of the railroad company.

This act (sect. 1) authorizes and requires the governor "to indorse in behalf of the state the first mortgage bonds of any railroad company in the state having completed and equipped 20 continuous miles of railroad, at the rate of \$12,000 per mile, for each section of 20 miles so completed and equipped."

The act further provides (sect. 4), that the railroad company is authorized "to issue the bonds of the company for such amount as it may determine, bearing interest at a rate not to exceed eight per cent. per annum, the interest to be paid semi-annually; . . . said bonds when indorsed by the governor on the part of the state shall recite the fact that they are first mortgage bonds, issued in accordance with and upon the conditions of this act; and said first mortgage and bonds issued thereon shall have priority in favor of the state (over) any and all other liens whatever." See Acts of Alabama for 1866, 1867, p. 680.

It is plain that the theory of complainants is that the governor, having indorsed their bonds in behalf of the state, this act constitutes a statutory mortgage prior in equity to all other claims; that this mortgage was intended to secure the state against its indorsement, and the bonds having come to the hands of complainants as *bond fide* holders, they are subrogated to the rights of the state, and the lien of the state enures to their benefit.

The failure of the railroad company to execute a trust deed on its property to secure these bonds has placed the bondholders in this embarrassment: that there are no trustees to represent their interest, and they are compelled to appear personally in any suit which affects their interest in the property.

Separate demurrers have been filed to the bill by Andrew J. Lane, by the Montgomery & Eufaula Railroad Company, and by the South & North Alabama Railroad Company.

Several of the grounds of demurrer have been avoided by an amendment to the bill. These it is unnecessary to notice. In examining the remaining causes of demurrer I shall pursue such order as may seem most convenient.

I remark in the outset that the demurrers are filed to the whole bill and not to any specified parts of it. In order, therefore, to sustain the demurrers the grounds alleged on some of them must extend to the whole bill. Those which refer to or affect only a part of the bill cannot be a ground for a dismissal of the entire bill.

The first ground of demurrer which I shall notice is that the State of Alabama is not made a party, and no reason is given why she is not made a party.

The state cannot be sued in a court of the United States. The 11th amendment to the Constitution of the United States excludes the jurisdiction. She cannot even by her own consent be made a party complainant, for that would avert the jurisdiction of the court, the principal defendant being a citizen of the State of Alabama. As this is matter of law and public statute, of which this court takes judicial notice, it was unnecessary to aver in the bill the reason why the state was not made a party. Does the fact that the state cannot be made a party excuse her absence from the suit, and can the bill be maintained unless she is a party?

Where a state is concerned, the state should be made a party if it can be done; that it cannot be done is a sufficient reason for the omission to do it. *Osborn v. The Bank of the United States*, 9 Wheat. 378; *Davis v. Gray*, 16 Wall. 220.

The state is in the position of surety on these bonds on which the suit is barred, having received from the railroad company, the principal debtor, indemnity in the form of a statutory lien upon the property of the railroad company. The complainants hold the bonds, and ask a decree against the railroad company for the unpaid interest accrued thereon, and the sale of the property pledged as security; also relief is or can be sought against the state. The state, it is true, is interested in having the pledged property fairly applied to the extinguishment of its liability, and this court will take care, as it should, that this is done. The fact that the state is thus interested in the property is no reason why she must necessarily be made a party to a suit in which no decree is sought against her. The indorser of a note secured by a mortgage is not a necessary party to a suit to foreclose the mortgage. If the state has paid any interest on these bonds, and is thereby entitled to any part of the proceeds of the mortgaged property, she can propound her claim before the master and it will be allowed.

Suppose we turn the complainants out of this court because the state is not a party. If they go into the state court they are met by the same difficulty, for the state will not allow herself to be sued in her own courts. Can it be possible that these complainants are without remedy against the railroad company because their bonds are indorsed by the plighted faith of the State of Alabama. It would be a reproach to the administration of justice to so hold.

It is set up as another ground of demurrer, that as the state cannot be sued the complainants can be subrogated to the rights of the state under the statutory mortgage which secures the bonds. The law of subrogation is the creation of equity. It is resorted to to prevent a failure of justice. 1 Story's Equity, §§ 327, 638; *Moses v. Murgatroyd*, 1 Johns. Chan. R. 119.

In view of this fact it would be a strange proceeding for this court sitting as a court of equity to deny the right of subrogation in this case, because the state cannot be made a party here while she refuses to be a party elsewhere.

It is next alleged, as a ground of demurrer to the bill, that in fact there is no statutory mortgage or lien upon the property of the railroad company to secure the bonds held by complainants, because the governor had no authority to indorse these bonds. His indorsement is therefore void. The state incurred no obligation by reason of the manual indorsement of the governor, and consequently no lien was created thereby to indemnify the state. There was no liability against which the state could be indemnified.

This claim is based on two grounds: (1) Because the statute authorizes only the indorsement of bonds bearing eight per cent. interest, and these bonds bear eight per cent. interest in gold; and (2) Because the statute authorizes the indorsement of first mortgage bonds only, and the public statutes of the State of Alabama show that the bonds in suit are not first mortgage bonds.

Does the fact that the interest on the bonds is eight per cent. payable in gold make the interest greater than eight per cent.? The defendants claim that it does; that of necessity the agreement to pay in gold is an agreement to pay more than eight per cent. in currency. I cannot assent to this. It depends entirely upon contingencies, which, whether interest in gold is better than interest in currency, cannot be foreseen. If gold is at a premium when the interest falls due, then it would take more than eight per cent. in currency to pay the interest. If it is not, it would just take eight per cent. If gold was at a discount, as under many circumstances it might well be, then eight per cent. in currency would more than pay the interest. Suppose the agreement were to pay eight per cent. in Demand Treasury Notes of the United States, which are a legal tender, and they, when the interest was due, happened to be at a premium, as compared with United States notes, also a legal tender, would that really make the rate of interest greater than eight per cent.?

When the legislature authorized the indorsement of bonds bearing eight per cent. interest, the fair construction was that it meant eight per cent. in any legal tender currency on which the parties might agree. At the time of the passage of the act "there were two descriptions of lawful money in use under the acts of Congress, in either of which damages for non-performance of contracts, whether made before or since the passage of the currency acts, might be properly assessed in the absence of any different understanding or agreement between the parties." *Butler v. Horwitz*, 7 Wall. 258.

But I place my decision upon this point on the ground that a contract to pay eight per cent. interest in gold is not a contract to pay more than eight per cent., because when the interest falls due gold may happen to be at a premium.

This same question substantially has been decided by the supreme court of the United States, in *Mayor v. The City of Muscatine*, 8 Wall. 391. In that case authority was conferred upon the city of Muscatine to issue bonds bearing a rate of interest "not higher than ten per cent. per



annum." The interest on the bonds was made payable semi-annually. This method of payment increased the burden on the city, and was an advantage to the bondholder. It, in fact, and under all circumstances, amounted to a higher rate of interest than ten per cent. per annum. It was objected that by issuing such bonds the authority conferred upon the city was transcended, and a usurious rate agreed to be paid, but the supreme court held otherwise, and sustained the bonds.

I am of opinion, therefore, that the governor was not precluded by the law from indorsing the bonds because the interest was payable in gold.

The second ground, upon which it is claimed that the governor was without authority to indorse the bonds, is that there was a prior mortgage upon the railroad company's property, and the bonds indorsed could not, therefore, be first mortgage bonds.

Let us concede, what defendants claim, that there was a prior mortgage on the road at the date of these bonds. Were the holders of the bonds under the necessity of taking notice of that fact, and does the fact make the bonds void in the hands of a *bond fide* holder for value?

If the governor was without any authority to indorse any bonds, his indorsement would be void. If the law authorized him to indorse the bonds of the A. & C. Railroad, and he undertook to indorse the bonds of the South & North Alabama Railroad, his indorsement would be void. But in this case there is no dispute that the law authorized him to indorse the bonds of the Montgomery & Eufaula Railroad, on the conditions that there should be completed, and equipped 20 miles of road before any indorsement, and that the indorsement should not exceed \$16,000 per mile of completed railroad, and that the bonds indorsed should be first mortgage bonds. The authority of the governor to indorse such bonds on such conditions is not disputed. Now, suppose the governor indorses bonds of a railroad company before 20 miles of its road are completed and equipped, or indorses the bonds at a rate greater than \$16,000 per mile, are the bonds on that account void in the hands of a bondholder? Clearly not. The unbroken authority of cases decided by the supreme court of the United States is to the effect that such bonds are valid. *Knowles v. Aspinwall*, 21 How. 539; *Mercer Co. v. Hackett*, 1 Wall. 83; *Mayor v. Muscatine*, Ib. 384.

In the case last cited the supreme court says, "that if the legal authority was sufficiently comprehensive, a *bond fide* holder for value has the right to presume that all precedent requirements have been complied with." See, also, *Grand Chute v. Winegur*, 13 Wall. 355.

But do these authorities cover the case where an indorsement is authorized of first mortgage bonds, and the governor indorses bonds of a railroad company whose property is subject to a prior mortgage? After some hesitation I have come to the conclusion that they do.

Unquestionably the duty is imposed on the governor by the Internal Improvement Act, as subsequently amended (Acts of 1866, 1867, p. 686), to decide whether the conditions precedent to the indorsement have been complied with. "When any railroad company," says the law, "shall have finished, completed, and equipped 20 continuous miles of road, it shall be the duty of the governor, and he is hereby required, to indorse on the part of the state the first mortgage bonds of said railroad company to the

extent of \$16,000 per mile," &c. It is as much his duty to ascertain that the bonds to be indorsed by him are first mortgage bonds, as it is to ascertain that 20 miles of the railroad have been completed and equipped. These conditions stand on precisely the same ground, namely, that the security of the state for its indorsement may be sufficient.

The law not only makes it the duty, but gives the governor the authority, to determine these facts, and having determined them, to indorse the bonds. The legal authority to make the indorsement is sufficiently comprehensive to include the indorsement of the bonds in question; and the governor having placed his indorsement upon the bonds and certified in the indorsement itself that it was made in pursuance of the act of the legislature, I think a *bonâ fide* holder has the right to presume that all precedent requirements have been complied with, and that there are no prior liens upon the railroad; and, so far as he is concerned, this presumption cannot be rebutted.

But defendants say that the holders of these bonds are bound to take notice of what is contained in the statutes of the State of Alabama, and that the Act approved December 30, 1868 (Laws of 1868, p. 497), entitled An act to authorize the governor to indorse the bonds of the Montgomery & Eufaula Railroad Company, under the Act of 19th of February, 1867, and its amendments, shows upon its face that the bonds of the railroad company were not first mortgage bonds. This act declares, "That the governor of this state be, and he is hereby, authorized to indorse the bonds of the Montgomery & Eufaula Railroad Company, to the extent authorized by the act to establish a system of internal improvements in the State of Alabama, passed and approved February 19, 1867, and the amendments made to said act, notwithstanding the indebtedness of said company to the State of Alabama for \$30,000, and the mortgage made by said company to the state under the Act approved 17th February, 1866. Provided, that all sums of money which have been heretofore advanced by the State of Alabama, by the indorsement of bonds hitherto, shall be reckoned and regarded as so much of the amount authorized to be extended to said road by the authority of this act."

If this is a valid enactment it covers completely any want of authority in the governor to indorse the bonds of the railroad company by reason of a prior mortgage. It is a ratification of his indorsement, and makes it good and valid in all respects: this is conceded. But the defendants say it was not passed by the number of votes required by the Constitution of the state for the passage of such an act, and that the journals of the legislature show the fact; that it is therefore null and void, and no law at all.

If this position be true, what becomes of the claim, that the bondholders were bound to take notice of its contents. If it is no law, it is not constructive notice to anybody of anything. It is without effect, to all intents and purposes. It cannot be said that a bondholder in Europe or New York is bound by constructive notice of an act that never passed the legislature, but which by some mistake of the printer, or some one else, found its way among the published acts of the state.

I am of opinion, therefore, that the bonds of the Montgomery & Eufaula Railroad Company in the hands of *bonâ fide* holders are valid, that the

indorsement of the governor is valid, and that by said indorsement the state acquired a valid lien upon said railroad property, superior to all other liens, unless it be that of the South & North Alabama Railroad Company. Whether the lien of complainants is better than that of the South & North Railroad Company it is not now necessary to decide.

I have noticed all the grounds of demurrer which go to the entire bill, and am of opinion that none of them are well taken, and the demurrer must therefore be overruled.

A question, raised by one of the grounds of demurrer and much discussed during the argument, was whether this court would, if the bill was sustained, appoint a receiver to take possession of the property of the defendant railroad company, according to the prayer of the bill.

It seems to me that there can be but one answer to this question. It appears from the bill that a suit to foreclose the second mortgage, executed by the defendant railroad company, is now pending in the United States circuit court for the Southern District of Alabama; and that in that case the defendant Lane has been appointed receiver, that he has taken possession of all the mortgaged property, and is administering it under the order and directions of that court.

If there are any adjudged cases which would authorize this court to interfere with the possession of a receiver appointed by another court having jurisdiction, and who is in actual possession of the property, they have never fallen under my observation. The authorities all sustain the contrary doctrine. *Smith v. McIver*, 9 Wheat. 532; *Williams v. Benedict*, 8 How. 107; *Wiswell v. Sampson*, 14 How. 52; *Taylor v. Carryl*, 20 How. 583; *Mellet v. Dexter*, 1 Curt. 178; *Ala. & Chattanooga R. R. Co. v. Jones*, 7 Bank. Reg. 331; *Memphis City v. Dean*, 8 Wall. 64.

These authorities show that a question, which is pending in one court of competent jurisdiction, cannot be raised and agitated in another court; much less can one court assume to take possession of and administer property which is in the possession of another court and in course of administration by it. Nor is the case for the appointment of a receiver by this court aided by the leave granted to complainants by a judge of the court, when the other suit is pending to sue the receiver appointed in such other suit. It is clear the leave given did not contemplate such a proceeding as the removal of that receiver by this court. No court or judge would be authorized to grant such a leave *ex parte*, and thus dispose of valuable rights and advantages of other parties, without giving them at least their day in court.

There are no averments in the bill which would justify the court which appointed Lane receiver in removing him from his trust. And no matter what showing the complainants may be able to make as to the incompetency, unfitness, or dishonesty of the receiver, this court cannot act. That showing must be made to the court which appointed him, and it must be asked to remove him. If these complainants are not satisfied with the manner in which the suit and proceedings of *Strong v. The Railroad Co.* are conducted in the United States circuit court for the Southern District of Alabama, they must become, if they can, parties to that suit, and make their complaints to that court. This court does not sit to revise or review the proceedings of that court. Any motion, therefore, to appoint a receiver

in this case, while the property to be administered is in the possession of a receiver appointed by another court, must be overruled, and this court can entertain no motion to remove or otherwise interfere with a receiver appointed by another court.

I add a few words in regard to the relations which the two cases referred to bear to each other. That suit was commenced by the holders of second mortgage bonds. They did not see fit to make the holders of the first mortgage bonds parties, nor was it necessary for them to do so. Calvert on Parties, 13, 14; Story's Eq. Pl. § 193. They have the right to proceed to a decree and sell the mortgaged property, but the sale must necessarily be made subject to the lien of the first mortgage bonds. The holders of these bonds are not parties, and can only be made parties by service of process or voluntary appearance. No general notice calling on them to present their claims will make them parties or bind them. If they were represented in the case by trustees, then a notice calling upon them to present their bonds before the master would be binding. But they are in no way represented in that suit. Their rights cannot therefore be affected by any decree in that case. *Campbell v. The Railroad Co.* 1 Woods, 368.

They have the same right to commence suit in this mortgage as the holders of second mortgage bonds have in theirs. But as the latter have commenced their suit first and have first obtained possession of the mortgaged property, the suit of the first mortgage bondholders cannot be allowed to interfere with the suit of the second mortgage bondholders. They can only interfere by being admitted as parties in that suit.

When the suit of the second mortgage bondholders has ripened into a decree of sale and the property has been sold, the first mortgage holders may then proceed in their suit to subject the property again to sale to satisfy their lien. But not till the proceedings in the first suit have so resulted that the property is no longer in the possession of the court through its receiver, can any other court or parties interfere with it.

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## SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1875.]

CONSTITUTIONAL LAW. — REGULATION OF COMMERCE. — LICENSE TAX.

### WELTON v. THE STATE OF MISSOURI

1. A license tax required for the sale of goods is in effect a tax upon the goods themselves.
2. A statute of Missouri which requires the payment of a license tax from persons who deal in the sale of goods, wares, and merchandise which are not the growth, produce, or manufacture of the state, by going from place to place to sell the same in the state, and requires no such license tax from persons selling in a similar way goods which are the growth, produce, or manufacture of the state, is in conflict with the power

vested in Congress to regulate commerce with foreign nations and among the several states.

3. That power was vested in Congress to insure uniformity of commercial regulation against discriminating state legislation. It covers property which is transported as an article of commerce from foreign countries, or among the states, from hostile or interfering state legislation until it has mingled with and become a part of the general property of the country, and protects it even after it has entered a state from any burdens imposed by reason of its foreign origin.
4. The inaction of Congress in prescribing rules to govern inter-state commerce is equivalent to its declaration that such commerce shall be free from any restrictions.

IN error to the supreme court of Missouri.

Mr. Justice FIELD delivered the opinion of the court.

This case comes before us on a writ of error to the supreme court of Missouri, and involves a consideration of the validity of a statute of that state discriminating in favor of goods, wares, and merchandise which are the growth, product, or manufacture of the state, and against those which are the growth, product, or manufacture of other states or countries, in the conditions upon which their sale can be made by travelling dealers. The plaintiff in error was a dealer in sewing-machines which were manufactured without the State of Missouri, and went from place to place in the state selling them without a license for that purpose. For this offence he was indicted and convicted in one of the circuit courts of the state, and was sentenced to pay a fine of fifty dollars, and to be committed until the same was paid. On appeal to the supreme court of the state the judgment was affirmed.

The statute under which the conviction was had declares that whoever deals in the sale of goods, wares, or merchandise, except books, charts, maps, and stationery, which are not the growth, produce, or manufacture of the state, by going from place to place to sell the same, shall be deemed a pedler; and then enacts that no person shall deal as a pedler without a license, and prescribes the rates of charge for the licenses, these varying according to the manner in which the business is conducted, whether by the party carrying the goods himself on foot, or by the use of beasts of burden, or by carts or other land carriage, or by boats or other river vessels. Penalties are imposed for dealing without the license prescribed. No license is required for selling in a similar way — by going from place to place in the state — goods which are the growth, product, or manufacture of the state.

The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the supreme court of the state; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the state.

The general power of the state to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the state to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer. But if such tax conflict with any power vested in Congress by the Constitution

of the United States, it will not be any the less invalid because enforced through the form of a personal license.

In the case of *Brown v. Maryland*, 12 Wheat. 425, 444, the question arose whether an act of the Legislature of Maryland requiring importers of foreign goods to pay the state a license tax before selling them in the form and condition in which they were imported, was valid and constitutional. It was contended that the tax was not imposed on the importation of foreign goods, but upon the trade and occupation of selling such goods by wholesale after they were imported. It was a tax, said the counsel, upon the profession or trade of the party when that trade was carried on within the state, and was laid upon the same principle with the usual taxes upon retailers, or inn-keepers, or hawkers and pedlers, or upon any other trade exercised within the state. But the court, in its decision, replied that it was impossible to conceal the fact that this mode of taxation was only varying the form without varying the substance, that a tax on the occupation of an importer was a tax on importation, and must add to the price of the article and be paid by the consumer or by the importer himself in like manner as a direct duty on the article itself. Treating the exaction of the license tax from the importer as a tax on the goods imported, the court held that the act of Maryland was in conflict with the Constitution; with the clause prohibiting a state, without the consent of Congress, from laying any impost or duty on imports or exports, and with the clause investing Congress with the power to regulate commerce with foreign nations.

So, in like manner, the license tax exacted by the State of Missouri from dealers in goods which are not the product or manufacture of the state, before they can be sold from place to place within the state, must be regarded as a tax upon such goods themselves. And the question presented is, whether legislation thus discriminating against the products of other states, in the conditions of their sale by a certain class of dealers, is valid under the Constitution of the United States. It was contended in the state courts, and it is urged here, that this legislation violates that clause of the Constitution which declares that Congress shall have the power to regulate commerce with foreign nations and among the several states. The power to regulate, conferred by that clause upon Congress, is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled; how far it shall be burdened by duties and imposts, and how far it shall be prohibited.

Commerce is a term of the largest import; it comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the states may provide regulations until Congress acts with reference to them. But where the subject to which the power applies is national in its character,

or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority.

It will not be denied that that portion of commerce with foreign countries and between the states, which consists in the transportation and exchange of commodities, is of national importance and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating state legislation. The depressed condition of commerce and the obstacles to its growth previous to the adoption of the Constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question. "It was regulated," says Chief Justice Marshall, in delivering the opinion in *Brown v. Maryland*, *supra*, "by foreign nations with a single view to their own interests, and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties, but the inability of the federal government to enforce them became so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress." 12 Wheat. 446.

The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection, and to no greater burdens. If at any time before it has thus become incorporated into the mass of property of the state or nation, it can be subjected to any restrictions by state legislation, the object of investing the control in Congress may be entirely defeated. If Missouri can require a license tax for the sale by travelling dealers of goods which are the growth, product, or manufacture of other states or countries, it may require such license tax as a condition of their sale from ordinary merchants, and the amount of the tax will be a matter resting exclusively in its discretion.

The power of the state to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one state and injurious to the interests of other states and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the states.

There is a difficulty, it is true, in all cases of this character, in drawing the line precisely where the commercial power of Congress ends and the power of the state begins. A similar difficulty was felt by this court in

*Brown v. Maryland*, in drawing the line of distinction between the restriction upon the power of the states to lay a duty on imports and their acknowledged power to tax persons and property; but the court observed that, though the two were quite distinguishable when they did not approach each other, yet, like the intervening colors between white and black, approached so nearly as to perplex the understanding, as colors perplexed the vision in marking the distinction between them, yet that the distinction existed and must be marked as the cases arose. And the court, after observing that it might be premature to state any rule as being universal in its application, held that when the importer had so acted upon the thing imported that it had become incorporated and mixed up with the mass of property in the country, it had lost its distinctive character as an import and become subject to the taxing power of the state; but that while remaining the property of the importer, in his warehouse in the original form and package in which it was imported, the tax upon it was plainly a duty on imports, prohibited by the Constitution.

Following the guarded language of the court in that case we observe here, as was observed there, that it would be premature to state any rule which would be universal in its application to determine when the commercial power of the federal government over a commodity has ceased and the power of the state has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the state, from any burdens imposed by reason of its foreign origin. The act of Missouri encroaches upon this power in this respect, and is, therefore, in our judgment, unconstitutional and void.

The fact that Congress has not seen fit to prescribe any specific rules to govern inter-state commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-state commerce shall be free and untrammelled. As the main object of that commerce is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation like that of Missouri.

The views here expressed are not only supported by the case of *Brown v. Maryland*, already cited, but also by the case of *Woodruff v. Parham*, reported in the 8th of Wallace, and the case of the *State Freight Tax*, reported in the 15th of Wallace. In the case of *Woodruff v. Parham*, Mr. Justice Miller, speaking for the court, after observing with respect to the law of Alabama then under consideration, that there was no attempt to discriminate injuriously against the products of other states or the rights of their citizens, and the case was not, therefore, an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity, said: "But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects, and, therefore, void."

The judgment of the supreme court of the State of Missouri must be reversed and the cause remanded, with directions to enter a judgment reversing the judgment of the circuit court and directing that court to discharge the defendant from imprisonment and suffer him to depart without day.



## SUPREME COURT OF THE UNITED STATES.

JUDGMENT WHERE APPEARANCE HAS BEEN ENTERED BY ONE PARTNER FOR HIMSELF AND OTHER PARTNERS, AFTER DISSOLUTION OF FIRM. — INVALIDITY OF JUDGMENT BASED UPON SUCH APPEARANCE.

## HALL v. LANNING.

After the dissolution of a copartnership, one of the partners, in a suit brought against the firm, has no authority to enter an appearance for other partners who do not reside in the state where suit is brought and have not been served with process.

And a judgment against all the partners formed upon such an appearance may be questioned by those not served with process in a suit brought thereon in another state.

In error to the circuit court of the United States for the Northern District of Illinois.

Mr. Justice BRADLEY delivered the opinion of the court.

This was an action of debt brought on a judgment rendered in New York against the plaintiffs in error. One of them, Lybrand, pleaded separately *nul tiel record*, and several special pleas questioning the validity of the judgment as against him for want of jurisdiction over his person. On the trial the plaintiff simply gave in evidence the record of the judgment recovered in New York, which showed that an attorney had appeared and put in an answer for both defendants, who were sued as partners. The answer admitted the partnership, but set up various matters of defence. The cause was referred and judgment given for the plaintiffs. This was the substance of the New York record. The plaintiffs gave no further evidence.

Lybrand then offered to prove that he, Lybrand, never was a resident or citizen of the State of New York; and that he had not been within said State of New York at any time since, nor for a long time before, the commencement of the suit in which the judgment was rendered, upon which the plaintiff in this case brought suit; and that he never had any summons, process, notice, citation, or notice of any kind, either actual or constructive, ever given or served upon him; and that he never authorized any attorney or any other person to appear for him; and that no one ever had any authority to appear for him in said suit in the State of New York, or to enter his appearance therein, nor did he ever authorize any one to employ an attorney to appear for him in the action in which said judgment was entered; and that he never entered his appearance therein in person; and that he knew nothing of the pendency of said suit in the said State of New York until the commencement of the present suit in this court; that said Lybrand was a partner in business with said J. Sherman Hall at the time the transaction occurred upon which the plaintiffs brought suit in New York, though said partnership had been dissolved and due notice thereof published some six months prior to the commencement of said suit in New York.

This evidence being objected to, was overruled by the court, which instructed the jury as follows: "That the record introduced in evidence by the plaintiffs was conclusive evidence for the plaintiffs to maintain the is-

sues submitted to the jury by the pleadings, and that they should return a verdict for the plaintiffs and against both defendants."

A bill of exceptions being taken to this ruling, the matter is brought here on writ of error.

The question to be decided, therefore, is, whether, after the dissolution of a copartnership, one of the partners in a suit brought against the firm has authority to enter an appearance for the other partners who do not reside in the state where the suit is brought and have not been served with process; and if not, whether a judgment against all the partners, founded on such an appearance, can be questioned by those not served with process in a suit brought thereon in another state. We recently had occasion, in the case of *Thompson v. Whitman* (18 Wall. 457), to restate the rule that the jurisdiction of a foreign court over the person or the subject matter embraced in the judgment or decree of such court, is always open to inquiry, and that in this respect the court of another state is to be regarded as a foreign court. We further held in that case that the record of such a judgment does not estop the parties from demanding such an inquiry. The cases bearing upon the subject having been examined and distinguished on that occasion, it is not necessary to examine them again, except as they may throw light on the special question involved in this cause. In the subsequent case of *Knowles v. The Gas Light Co.* (19 Wall. 58), we further held, in direct line with the decision in *Thompson v. Whitman*, that the record of a judgment showing service of process on the defendant could be contradicted and disproved.

It is sought to distinguish the present case from those referred to, on the ground that the relation of partnership confers upon each partner authority, even after dissolution, to appear for his copartners in a suit brought against the firm, though they are not served with process and have no notice of the suit. In support of this proposition, so far as relates to any such authority after dissolution of the partnership, we are not referred to any authority directly in point, but reliance is placed on the powers of partners in general, and on that class of cases which affirm the right of each partner, after a dissolution of the firm, to settle up its business. But, in our view, appearance to a suit is a very different thing, from those ordinary acts which appertain to a general settlement of business, such as receipt and payment of money, giving acquittances, and the like. If a suit be brought against all the partners, and only one of them be served with process, he may, undoubtedly, in his own defence, show, if he can, that the firm is not liable, and to this end defend the suit. But to hold that the other partners, or persons charged as such, who have not been served with process, will be bound by the judgment in such a case, which shall conclude them as well on the question whether they were partners or not when the debt was incurred, as on that of the validity of debt, would, as it seems to us, be carrying the power of a partner after a dissolution of the partnership to an unnecessary and unreasonable extent.

The law, indeed, does not seem entirely clear that a partner may enter an appearance for his copartners without special authority even during the continuance of the firm. It is well known that by the English practice, in an action on any joint contract, whether entered into by partners or others, if any defendant cannot be found, the plaintiff must proceed to

outlawry against him before he can prosecute the action, and then he declares separately against those served with process, and obtains a separate judgment against them, but no judgment except that of outlawry against the defendant not found. 1 Chitty's Plead. 42; Tidd's Pract. chap. 7, p. 423, 9th ed. A shorter method by *distringas* in place of outlawry has been provided by some modern statutes, but founded on the same principle. Now, it seems strange that this cumbrous and dilatory proceeding should be necessary in the case of partners if one partner has a general authority to appear in court for his copartners. On the basis of such an authority, had it existed, the courts, in the long lapse of time, ought to have found some means of making service on one answer for service on all. But this was never done. In this country, it is true, as will presently be shown, legislation to this end (applicable, however, to all joint debtors) has been adopted, but it is generally conceded that a judgment based on such service has full and complete effect only as against those who are actually served. Further reference to this subject will be made hereafter.

It must be conceded, however, that the general authority of one partner to appear to an action on behalf of his copartners, during the continuance of the firm, has been asserted by several text writers. Gow on Partnership, 163; Collyer on Part. § 441; Parsons on Part. 174, note. But the assertion is based on somewhat slender authority. We find it first laid down in Gow, who refers to a dictum of Sergeant Dampier, made in the course of argument (7 T. R. 207), and to the case of *Morley v. Strombong* (3 Bosanquet & Puller, 254), where the court refused to discharge partnership goods taken on a *distringas* to compel the appearance of an absent partner, unless the partner who was served would enter an appearance for him. As to this case, it may be said that it is not improbable that the home partner had express authority to appear in suits for his copartner; for in a subsequent case (*Goldsmith v. Levy*, 4 Taunt. 299), a *distringas*, issued under the same circumstances, was discharged where the home partner made affidavit that the goods were his own, and that he had no authority to appear for his copartner. These seem to be the only authorities relied on.

But, as said before, these authorities, and one or two American cases which follow them, refer only to appearances entered whilst the partnership was subsisting; and, it is pertinent also to add that they only refer to the validity and effect of judgments in the state or country in which they are rendered.

Domestic judgments, undoubtedly (as was shown in *Thompson v. Whitman*), stand, in this respect, on a different footing from foreign judgments. If regular on their face, and if appearance has been duly entered for the defendant by a responsible attorney, though no process has been served and no appearance authorized, they will not necessarily be set aside, but the defendant will, sometimes, be left to his remedy against the attorney in an action for damages; otherwise, as has been argued, the plaintiff might lose his security by the act of an officer of the court. *Denton v. Noyes*, 6 Johns. 296; *Grazebrook v. McCreddie*, 9 Wend. 437. But even in this case, it is the more usual course to suspend proceedings on the judgment, and allow the defendants to plead to the merits

and prove any just defence to the action. In any other state, however, except that in which the judgment was rendered (as decided by us in the cases before referred to), the facts could be shown, notwithstanding the recitals of the record, and the judgment would be regarded as null and void for want of jurisdiction of the person.

So, it may well be, that where appearance has been entered by authority of one of several copartners on behalf of all, that the courts of the same jurisdiction will be slow to set aside the judgment unless it clearly appears that injustice has been done; and will rather leave the party who has been injured by an unauthorized appearance to his action for damages.

There are many other cases in which a judgment may be good within the jurisdiction in which it was rendered so far as to bind the debtor's property there found, without personal service of process or appearance of the defendant; as in foreign attachments, process of outlawry, and proceedings *in rem*.

Another class of cases is that of joint debtors, before alluded to. In most of the states legislative acts have been passed, called joint debtor acts, which, as a substitute for outlawry, provide that if process be issued against several joint debtors, or partners, and served on one or more of them, and the others cannot be found, the plaintiff may proceed against those served, and, if successful, have judgment against all. Various effects and consequences are attributed to such judgments in the states in which they are rendered. They are generally held to bind the common property of the joint debtors, as well as the separate property of those served with process, when such property is situated in the state, but not the separate property of those not served; and whilst they are binding personally on the former, they are regarded as either not personally binding at all, or only *prima facie* binding, on the latter. Under the joint debtor act of New York, it was formerly held by the courts of that state that such a judgment is valid and binding on an absent defendant as *prima facie* evidence of a debt, reserving to him the right to enter into the merits and show that he ought not to have been charged.

The validity of a judgment rendered under this New York law, when prosecuted in another state, against one of the defendants who resided in the latter state, and was not served with process, though charged as a copartner of a defendant residing in New York, who was served, was brought in question in this court in December term, 1850, in the case of *D'Arcy v. Ketchum*, 11 Howard, 165. It was there contended that by the Constitution of the United States, and the act of Congress passed May, 26, 1790, in relation to the proof and effect of judgments in other states, the judgment in question ought to have the same force and effect in every other state which it had in New York. But this court decided that the act of Congress was intended to prescribe only the effect of judgments where the court by which they were rendered had jurisdiction; and that by international law, a judgment rendered in one state, assuming to bind the person of a citizen of another, was void within the foreign state, where the defendant had not been served with process or voluntarily made defence, because neither the legislative jurisdiction nor that of the courts of justice had binding force.

This decision is an authority which we recognized in *Thompson v. Whitman*, and in *Knowles v. Gas Light Company*, before cited, and which we adhere to as founded on the soundest principles of law. And in view of this decision it is manifest that many of the authorities which declare the effect of a domestic judgment, in cases where process has not been served on one or all of the defendants, and where those not served have not authorized any appearance, and do not reside in the state, can have little influence as to the effect to be given to such a judgment in another state.

It appearing to be settled law, therefore, that a member of a partnership firm, residing in one state, cannot be rendered personally liable in a suit brought in another state, against him and his copartners, although the latter be duly served with process, and although the law of the state where the suit is brought authorizes judgment to be rendered against him, the case stands on the simple and naked question whether his copartners, after a dissolution of the partnership, can, without his consent and authority, implicate him in suits brought against the firm by voluntarily entering an appearance for him.

We are of opinion that no authority can be found to maintain the affirmative of this question.

In the case of *Bell v. Morrison* (1 Peters, 351), this court decided, upon elaborate examination, that after a dissolution of the partnership, one partner cannot by his admissions, or promises, bind his former copartners. Appearance to a suit is certainly quite as grave an act as the acknowledgment of a debt.

It is well settled by numberless cases, that, even before dissolution, one partner cannot confess judgment, or submit to arbitration so as to bind his copartners. *Stead v. Salt*, 3 Bing. 101; *Adams v. Bankart*, 1 Cromp., Mee. & R. 681; *Karthauss v. Ferrer*, 1 Peters, 222, and cases referred to in Story on Partn. § 114; 1 Amer. Lead Cas. 5th ed. 556; Freeman on Judgments, sec. 232; Collyer on Part. sec. 469, 470, and notes; Parsons on Partn. 179, note.

It is equally well settled that, after dissolution, one partner cannot bind his copartners by new contracts or securities, or impose upon them a fresh liability. Story on Partn. § 322; *Adams v. Bankart*, *supra*.

Appearance to a suit does impose a fresh liability. If there is no doubt of the validity of the demand, it places that demand in a position to be made a debt of record. If there is doubt of it, it renders the defendant liable to have it adjudicated against him, when, perhaps, he has a good defence to it.

On principle, therefore, it is difficult to see how, after a dissolution, one partner can claim implied authority to appear for his copartners in a suit brought against the firm. It may, in some instances, be convenient that one partner should have such authority; and when such authority is desirable, it can easily be conferred either in the articles of partnership or in the terms of dissolution. But, as a general thing, one can hardly conceive of a more dangerous power to be left in the hands of the several partners after the partnership connection between them is terminated, or one more calculated to inspire a constant dread for impending evil, than that of accepting service of process for their former associates, and of ren-

dering them liable, without their knowledge, to the chances of litigation which they have no power of defending.

Few cases can be found in which the precise question has been raised. The attempt to exercise such a power does not appear to have been often made. Had it been, the question would certainly have found its way in the reports; for a number of cases have come up in which the power of a partner to appear for his copartners during the continuance of the partnership has been discussed. The point was raised in *Phelps v. Brewer* (9 Cushing, 390), but the court being of opinion that the power does not exist even pending the partnership, did not find it necessary to consider the effect of a dissolution upon it.

In Alabama, where a law was passed making service of process on one partner binding upon all, it was expressly decided, after quite an elaborate argument, that such service was not sufficient after a dissolution of the partnership, and that acknowledgment of service by one partner on behalf of all was also inoperative as against the other partners. *Duncan v. Tombeckbee Bank*, 4 Porter, 184; *Demott v. Swain's Adm'r*, 4 Stewart & Porter, 293.

In the case of *Loomis & Co. v. Pearson & McMichael* (Harper's South Carolina Reports, 470), it was decided that after a dissolution of partnership one partner cannot appear for the other; although it is true, that it had been previously decided by the same court in *Haslet v. Street et al.* 2 McCord, 311, that no such authority exists even during the continuance of the partnership.

But the absence of authorities, as before remarked, is strong evidence that no such power exists.

In our judgment the defendant Lybrand had a right, for the purpose of invalidating the judgment as to him, to prove the matter set up by him in his offer at the trial. And for the refusal of the court to admit the evidence the judgment should be reversed, with directions to award a *venire de novo*.

*Judgment reversed.*

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**BANKRUPTCY. — RIGHT OF CREDITOR TO MAINTAIN ACTION FOR BALANCE DUE IN EXCESS OF DIVIDEND.**

**NEW LAMP CHIMNEY CO. v. ANSONIA CO.**

Action was brought in a state court upon certain promissory notes. The defence was that defendant had been duly declared a bankrupt, that plaintiff had proved the claim sued on, and been paid a dividend thereon, and that the payment of such dividend had the effect to absolutely discharge the defendant from the whole of the claim sued on. *Held*, that the action was well founded, and could be maintained for the balance due in excess of the dividend.

IN error to the court of appeals of New York.

Mr. Justice CLIFFORD delivered the opinion of the court.

Corporations, whether moneyed, business, or commercial, and joint-stock companies are subject to the provisions of the bankrupt act, and the

thirty-seventh section of the act provides to the effect that upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor or creditors of the same, made and presented in the manner provided in respect to other debtors, the like proceedings shall be had and taken as are required in other cases of voluntary or involuntary bankruptcy; but the same section provides that no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person or officer or member thereof. 14 Stats. at Large, 535.

Nine overdue promissory notes executed by the corporation defendants were held by the corporation plaintiffs, amounting to the sum of \$5,266.94, and they instituted the present suit in the supreme court of the state to recover the amount.

Service being made, the defendants appeared and set up as a defence in their answer that they, the defendants, had on their own application been declared bankrupt, and that the plaintiffs had proved the claim in suit in the bankrupt proceedings and had been paid a dividend on the same, and that they were thereby prevented under the bankrupt act from recovering the claim, or any part of the same, in a subsequent action.

Issue being joined, the parties went to trial, and the bankrupt proceedings having been introduced in evidence, the defendants moved the court to dismiss the suit, insisting that the plaintiffs, having proved the claim in the bankrupt proceedings and received a dividend on the same, had waived the cause of action; but the presiding justice denied the motion, and directed the jury to render a verdict in favor of the plaintiffs for the balance due on the notes. Exceptions were duly filed by the defendants, and they appealed to the general term, where the judgment was affirmed, the court holding that the bankrupt court had no jurisdiction to adjudge the defendant corporation bankrupt, and that the proceedings in bankruptcy were void. *Brass & Copper Co. v. Lamp Chimney Co.* 64 Barb. 436.

Still dissatisfied, the defendants appealed to the court of appeals of the state, where the parties were again fully heard, and the court of appeals affirmed the judgment rendered by the court sitting in general term, holding that the decree of the bankrupt court adjudging the defendant corporation bankrupt, and the subsequent proceedings in pursuance of the same, did not have the effect to discharge the corporation from the claim in suit, beyond the amount paid to the plaintiffs as dividends, even though the claim was proved by the plaintiffs in the bankrupt proceedings. *Same v. Same*, 53 N. Y. 124; *S. C.* 13 Am. Rep. 476.

Sufficient appears to show that the defendants are a manufacturing corporation, organized under the law of the state, which authorizes three persons to form such a corporation, and requires that the trustees shall be stockholders of the company. *Sess. Laws* 1848, chap. 40, p. 54.

Nothing being alleged to the contrary, it must be assumed that the corporation was duly organized, and it appears that a meeting of the trustees was duly called and notified to inquire into the condition of the affairs of the corporation, and that the meeting was regularly held; and it having been ascertained to the satisfaction of the meeting that the corporation

was insolvent, it was voted and resolved, by a majority of the trustees present, that the president of the company be required to file a petition in the district court that the corporation may be adjudged bankrupt. Such a petition was accordingly filed, and if the president of the company was duly authorized to sign and file it, the plaintiffs do not deny that the bankrupt proceedings were regular.

Two objections are taken to the jurisdiction of the bankrupt court, which, in point of fact, involve the same considerations. They are that the majority of the stockholders did not sign the petition filed in the district court, and that the president of the corporation was not authorized to sign it, which is a mere inference from the fact that the meeting, when the vote and resolution were adopted, was a regular meeting of the trustees; but inasmuch as the statute of the state requires that the trustees shall be stockholders, and no objection is made to the organization of the company, it may well be presumed that the trustees were stockholders, as required by law.

As before remarked, three persons may form such a corporation, and the record shows that a majority of the trustees present adopted the vote and resolution, which necessarily implies that a minority did not concur; and, if not, then certainly there must have been three or more present, and the record does not show that the whole capital stock of the company is not owned by three persons.

Viewed in the light of these suggestions, it follows that the want of jurisdiction in the bankrupt court is not clearly shown, and that the case is plainly one where every presumption should be that the action of the court was rightful.

Due notice, it is conceded, was given to all concerned, and that the defendants appeared in the bankrupt court, and that they never made any objection to the jurisdiction of the court, and, in view of those circumstances, the rule is, that every presumption is in favor of the legal character of the proceedings. *Voorhees v. Bank*, 10 Pet. 473.

Concede that, still it is said that courts created by statute cannot have jurisdiction beyond what the statute confers, which is true; but no such question arises in the case before the court, as all concede that the district court had jurisdiction of the subject matter, and that the defendants appeared and claimed and exercised every right which the bankrupt act confers. They are, therefore, estopped to deny the jurisdiction of the court, nor are the plaintiffs in any better condition, unless it appears that the bankrupt proceedings are actually void. Void proceedings, of course, bind no one not estopped to set up the objection, and, in order to establish the theory that the proceedings in this case are void, the plaintiffs deny that the president of the corporation was authorized to make and file the petition in the district court. *McCormick v. Pickering*, 4 Comst. 279.

Such a petition might properly be made by the president of the company, and be by him presented to the district court, if he was thereto duly authorized at a legal meeting called for the purpose by a vote of a majority of the corporators; and whether he was so authorized or not was a question of fact, to be determined by the district court to which the petition was presented, and the rule in such cases is, that if there be



a total defect of evidence to prove the essential fact, and the court find it without proof, the action of the court is void; but when the proof exhibited has a legal tendency to show a case of jurisdiction, then, although the proof may be slight and inconclusive, the action of the court will be valid until it is set aside by a direct proceeding for that purpose. Nor is the distinction unsubstantial, as in the one case the court acts without authority, and the action of the court is void; but, in the other, the court only errs in judgment upon a question properly before the court for adjudication, and, of course, the order or decree of the court is only voidable. *Staples v. Fairchild*, 3 Comst. 46; *Miller v. Brinkerhoff*, 4 Denio, 119; *Voorhees v. Bank*, 10 Pet. 473; *Kinner v. Same*, 45 N. Y. 539.

Jurisdiction is certainly conferred upon the district court in such a case if the petition presented sets forth the required facts expressly or by necessary implication, and the court, upon proof of service thereof, finds the facts set forth in the petition to be true; and it is equally certain that the district court has jurisdiction of "all acts, matters, and things" to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and the close of the bankrupt proceedings. 14 Stat. at Large, 518.

Power, it is true, is vested in the circuit courts in certain cases to revise the doings of the district courts, and in certain other cases an appeal is allowed from the district court to the circuit court, but it is a sufficient answer to every suggestion of that sort, that an attempt was made in the case to seek a revision of the decree in any other tribunal. Nothing of the kind is suggested, nor can it be, as the record shows a regular decree unreversed and in full force.

Grant that, and still the proposition is submitted that the decree was rendered without jurisdiction for the reason assigned, and that that question is open to the defendants, even though the decree was introduced as collateral evidence in a suit at law or in equity in another jurisdiction. But the court here is entirely of a different opinion, as the district courts are created by an act of Congress which confers and defines their jurisdiction, from which it follows that their decrees rendered in pursuance of the power conferred are entitled in every other court to the same force and effect as the judgments or decrees of any domestic tribunal, as long as they remain unreversed and are not annulled. *Shawhan v. Merritt*, 7 How. 643; *Huff v. Hutchinson*, 14 Ib. 588; *Parker v. Danforth*, 16 Mass. 299; *Pecks v. Barnum*, 24 Vt. 76; 2 Smith's Lead. Cas. (7th ed.) 814.

Judgments or decrees rendered in the district courts may be impeached for the purpose of showing that the particular judgment or decree was procured for the purpose of avoiding the effect and due operation of the bankrupt act, and competent evidence is admissible for that intent and purpose; but the judgment or decree of the district court, in a case like the present, is no more liable to collateral impeachment, except to show that it was designed to prevent the equal distribution of the debtor's estate, than it is to such impeachment in the court where it was rendered. *Palmer v. Preston*, 45 Vt. 159; *Miller v. United States*, 11 Wall. 300.

Authority to establish uniform laws upon the subject of bankruptcy is conferred upon Congress, and Congress having made such provision in

pursuance of the Constitution, the jurisdiction conferred becomes exclusive throughout the United States. By the act of Congress, the jurisdiction to adjudge such insolvent corporations as are described in the thirty-seventh section of the act, to be bankrupts, is vested in the district courts, and it follows that such a decree is entitled to the same verity, and is no more liable to be impeached, collaterally, than the decree of any other court possessing general jurisdiction, which of itself shows that the case before the court is controlled by the general rule, that where it appears that the court had jurisdiction of the subject matter, and that process was duly served, or an appearance duly entered, the judgment or decree is conclusive, and is not open to any inquiry upon the merits. 2 Smith's Lead. Cas. (7th ed.) 622; Freeman on Judgments (2d ed.) § 606; *Hampton v. McConnell*, 3 Wheat. 234; *Gelston v. Hoyt*, 1b. 312; *Slocum v. Mayberry*, 2 Ib. 10; *Nations v. Johnson*, 24 How. 203; *D'Arcy v. Ketcham*, 11 Ib. 166; *Webster v. Reid*, 1b. 460.

Such a decree adjudging a corporation bankrupt is in the nature of a decree *in rem*, as respects the *status* of the corporation; and, if the court rendering it has jurisdiction, it can only be assailed by a direct proceeding in a competent court, unless it appears that the decree is void in form or that due notice of the petition was never given. *Way v. How*, 10 Mass. 503; *Ex parte Wieland*, L. R. 8 Ch. App. 489; *Ocean Bank v. Olcott*, 46 N. Y. 15; *Revell v. Blake*, L. R. 7 C. P. 308.

Suppose that is so, then it is insisted by the defendants that the case before the court is controlled by the twenty-first section of the bankrupt act, which, among other things, provides that no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, &c. 14 Stat. at Large, 526.

Debtors, other than corporations and joint-stock companies, are certainly within that provision, and if corporations are also within it, then it follows that the judgment must be reversed, as the plaintiffs are not entitled to recover. Instead of that, the plaintiffs deny that corporations or joint-stock companies are within that provision, and insist that the case before the court is controlled by the thirty-seventh section of the bankrupt act, which provides that no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person or officer or member thereof, which is the view of the case taken by the court of appeals of the state whose judgment is brought into review by the present writ of error. 14 Stat. at Large, 535; *Brass & Copper Co. v. Lamp Chimney Co.* 53 N. Y. 124; *S. C.* 13 Am. Rep. 476.

Difficulties, perhaps insurmountable, would attend the theory of the plaintiffs if the twenty-first section of the bankrupt act stood alone; but it does not stand alone, and being a part of a general system of statutory regulation, it must be read and applied in connection with every other section appertaining to the same feature of the general system, so that each and every section of the act may, if possible, have their due and conjoint effect without repugnancy or inconsistency.

Statutes must be interpreted according to the intent and meaning of the legislature, and that intention must, if practicable, be collected from the words of the act itself, or, if the language is ambiguous, it may be

collected from other acts *in pari materia*, in connection with the words, and sometimes from the cause or necessity of the statute; but where the language of the act is unambiguous and explicit, courts are bound to seek for the intention of the legislature in the words of the act itself, and they are not at liberty to suppose that the legislature intended anything different from what their language imports. *Potter's Dwarria*, 146.

Words and phrases are often found, in different provisions of the same statute, which, if taken literally, without any qualification, would be inconsistent and sometimes repugnant, when, by a reasonable interpretation, as by qualifying both or by restricting one and giving to the other a liberal construction, all become harmonious and the whole difficulty disappears; and in such a case the rule is that repugnancy should, if practicable, be avoided, and that if the natural import of the words contained in the respective provisions tends to establish such a result, the case is one where a resort may be had to construction for the purpose of reconciling the inconsistency, unless it appears that the difficulty cannot be overcome without doing violence to the language of the law-maker.

Section twenty-one, if taken literally, would require that the whole claim of every creditor proving his claim, who is included within its operation, should be forever discharged; but the thirty-third section of the act provides that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character, shall be discharged under the bankrupt act. Such debts may be proved, and the provision is that the dividend shall be a payment on account of the debt; but it is incorrect to suppose that the creditor by proving such a debt waives "all right of action and suit against the bankrupt." On the contrary, it is well settled that no consequences can be allowed to flow from proving a debt which are inconsistent with the provisions of section thirty-three. *Ex parte Robinson*, 6 Blatch. 253; *In re Rosenberg*, 2 N. B. R. 81.

Where the bankrupt has in all things conformed to his duty under the bankrupt act, he is entitled to receive a discharge, and the thirty-fourth section provides that a discharge duly granted shall, with the exceptions specified in the preceding section, release the bankrupt from all debts, claims, liabilities, and demands which were, or might have been, proved against his estate in bankruptcy.

Debts due to the United States are not enumerated in the exceptions contained in section thirty-three, but all admit that such debts may be proved in the bankrupt proceedings; and yet it is settled law that the certificate of discharge does not release any debt which the bankrupt owes to the United States. *U. S. v. Herron*, 20 Wall. 253.

Other examples of the kind might be referred to where it has become necessary to qualify, restrict, or limit certain provisions of the bankrupt act, in order to reconcile seeming incongruities and inconsistencies, but those mentioned will be sufficient for the present investigation.

Beyond all question corporations of the kind and joint-stock companies are brought within the provisions of the bankrupt act by the thirty-seventh section, and the whole administrative proceedings in respect to such bankrupt corporations and joint-stock companies are specifically regulated by that section as a separate feature of the bankruptcy

system. Much of the system applicable to such corporations and companies, it is true, is borrowed by general phrases from the other sections of the same act, but only such portions of the same as are expressly or impliedly adopted by that section are applicable to such corporations and companies, as clearly appears from the distinct features of the regulations prescribed, which are as follows:—

(1.) That the officer signing the petition for voluntary bankruptcy must be duly authorized by a vote of the majority of the corporators at a legal meeting called for the purpose. (2.) That the petition for involuntary bankruptcy may be made and presented by any creditor or creditors in the manner provided in respect to debtors, without any specification as to the number of creditors or the amount of their debts. (3.) That the like proceedings shall be had and taken as provided in the case of debtors. (4.) That all the provisions in the act which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examination, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner and with like force, effect, and penalties apply to each and every officer of such corporation or company, in relation to the same matters concerning the corporation or company and the money and property thereof. (5.) That all payments, conveyances, and assignments declared fraudulent and void by the act, when made by a debtor, shall in like manner and to the like extent and with like remedies be fraudulent and void when made by a corporation or company. (6.) That no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person or officer or member thereof. (7.) That all the property and assets of any corporation declared bankrupt by proceedings under the bankrupt act shall be distributed to the creditors of the corporation in the manner therein provided in respect to natural persons. 14 Stats. at Large, 535.

Special regulations in respect to petitions are enacted by section thirty-seven of the bankrupt act, where the insolvent is a corporation or joint-stock company, different from those prescribed in cases where the insolvent party is a natural person or partnership. But subject to the exception that no allowance or discharge shall be granted to any such corporation or joint-stock company, all of the administrative proceedings are to be the same as in case of bankrupt individuals, not because corporations are within the words of the other provisions of the bankrupt act, but because the thirty-seventh section of the act provides that the provisions of the act shall apply to such corporations and joint-stock companies: and it appears that all the administrative proceedings with that exception are required to be in conformity to the regulations prescribed in respect to individual bankrupt debts.

By the terms of the section, corporations adjudged bankrupt are also made subject to the same duties as individual bankrupt debtors in regard to all the matters therein specified; but the emphatic exception to all those general regulations is, that no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person, officer, or member thereof.

Examined in the light of these suggestions it is as clear as anything

dependent upon the construction of a statute well can be, that Congress, in giving jurisdiction to the district courts, to adjudge moneyed, business, and commercial corporations and joint-stock companies bankrupt, never intended to adopt the introductory paragraph of section twenty-one or section thirty-two, as applicable to such corporations or companies. Neither corporations of the kind or joint-stock companies are within the words of either of those sections, and it is equally clear that nothing is contained in section thirty-seven to support such a conclusion, from which it follows that the claim of the plaintiffs, beyond the amount received as dividends, is not discharged by the proceedings in bankruptcy.

Good and sufficient reasons may be given for granting a discharge from prior indebtedness to individual bankrupts which do not exist in the case of corporations, and equally good and sufficient reasons may be given for withholding such a discharge from corporations which do not in any sense apply to individual bankrupts. Certificates of discharge are granted to the individual bankrupt "to free his faculties from the clog of his indebtedness" and to encourage him to start again in the business pursuits of life with fresh hope and energy, unfettered with past misfortunes or with the consequences of antecedent improvidence, mismanagement, or rashness.

Many corporations, it is known are formed under laws which affix to the several stockholders an individual liability to a greater or less extent for the debts of the corporation, which, in case certain steps are taken by the creditors, become in the end the debts of the stockholders. Such a liability does not in most cases attach to the stockholder until the corporation fails to fulfil its contract, nor in some cases until judgment is recovered against the corporation and execution issued, and return made of *nulla bona*. Stockholders could not be held liable in such a case if the corporation is discharged, nor could the creditor recover judgment against the corporation as a necessary preliminary step to the stockholder's individual liability.

Consequences such as these were never contemplated by Congress, and the fact that they would flow from the theory of the defendants, if adopted, goes very far to show that the theory itself is unfounded and unsound. Instances of such individual liability are not rare, and it appears that the law under which the defendants were organized makes the several stockholders individually liable to the creditors of the company, in an amount equal to the amount of their stock, for all debts and contracts of the company, until the whole amount of the capital stock is subscribed and paid. Sess. Laws of N. Y. 1848, p. 56, § 10.

Bankrupts, other than corporations or joint-stock companies, if they have conformed in all things to their duty under the bankrupt act, are entitled to receive a certificate of discharge, and the provision is that such certificate shall operate to discharge such a bankrupt from all debts and claims, which by said act are made provable against his estate, subject, of course, to the exceptions described in the thirty-third section of the same act. *Bennett v. Goldthwait*, 109 Mass. 494; *Wilson v. Capuro*, 41 Cal. 545; *In re Wright*, 36 N. Y. 174.

Since this litigation was commenced, Congress has amended the twenty-

first section of the bankrupt act, and provided that where a discharge has been refused, or the proceedings have been determined without a discharge, a verdict proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt. 18 Stats. at Large, 179.

Comment upon that provision is unnecessary, as it clearly appears that the unamended act did not discharge the claim of the plaintiffs.

*Judgment affirmed.*

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SUPREME COURT OF MICHIGAN.

[JANUARY, 1876.]

MASTER AND SERVANT.—INJURY TO SERVANT.—RISKS INCIDENT TO  
NATURE OF EMPLOYMENT.

GILDERSLEEVE v. FORT WAYNE, JACKSON, AND SAGINAW RAIL-  
ROAD CO.

A railroad employee was killed in coupling a car that was lower than the rest. He had fully understood the risk incident to the use of the car, yet had not protested against its use to his employers, nor received from them any assurance that its use would be discontinued. The case was held not to be an exception to the rule that leaves the servant to bear the consequences of all the ordinary risks incident to his employment.

OPINION of the court by COOLEY, J.

The plaintiff as administratrix has recovered against the defendant a judgment for damages occasioned by the killing of the intestate, who was a servant in defendant's employ. The accident occurred while the intestate was engaged in coupling two cars, one of which was lower than the other, rendering the act of coupling peculiarly difficult and dangerous. The gravamen of the complaint is the negligence of defendant in making use of this low car, and subjecting its servants to the consequent risks. It is not claimed that the difficulty and danger were unknown to the intestate; on the contrary, much evidence was given on the part of the plaintiff to show that the danger was well understood by the intestate, and that the car had a bad reputation among the employees of defendant. What the bad reputation was for does not very distinctly appear, though the evidence tends to show that it was rather because its construction, — it being an old mail-car, — made it inconvenient for use, than for any other reason. This, however, is not very material. No question is made but that any difficulty that existed in coupling the car was understood by the intestate.

The question in the record is whether there was any evidence tending to establish a claim against the defendant. On the argument it has been assumed on both sides, that the rule of law which leaves the servant to bear the consequences of all the ordinary risks incident to his employment, ought to remain undisturbed. Both parties rely upon the case of

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*Davis v. Detroit & Milwaukee R. R. Co.* 20 Mich. 105, in which that rule was examined and approved, as a rule reasonable in itself, as it affected the particular relation of employer and employed, and as being also an important rule of public policy in its tendency to insure caution and vigilance on the part of persons employed.

The plaintiff relies upon exceptions to that rule, and claims to recover on the ground either that the defendant was guilty of a breach of duty to its employees in making use of a dangerous vehicle, or that it was culpable in not discontinuing its use in accordance with what were equivalent to assurances to the persons employed, that the car should be replaced by another. If the evidence tends to show a breach of duty in either of these particulars, it is insisted there was a case for the jury based upon the negligence of the employer, the risks of which the employed is never understood to assume.

Undoubtedly a servant has a right to repose confidence in the prudence and caution of his employer, and to rely upon his not putting him in charge of implements which, from improper construction or other cause, are so dangerous that a prudent man would not make use of them. If the servant is injured in consequence of this confidence being abused, he ought to be remunerated. But where the difficulties in the case are fully known to him, and he undertakes the employment, or continues in it without protest, and makes use of the implement without there being in the case anything in the nature of compulsion, it is a serious question whether his case is within the reason of recognized exceptions to the general rule. This, however, is a suggestion which will be passed over without discussion at this time.

The car which was the cause of the injury in this case was not in itself dangerous, or unfit for use. In coupling it with other cars peculiar caution was requisite, making it more liable to cause injury than would be a car of more modern construction. Its uses, therefore, made the employment more dangerous than it otherwise would be. In that particular the case may be compared to that of a farmer, who, with knowledge on the part of himself, and those in his employ, that a horse he has had in use is disposed to be fractious and unmanageable, continues nevertheless, to use him in his business. It may be compared to that of the merchant who continues to make use of a fluid for light, when something else which is within his reach has been demonstrated by experience to be safer. So far as we can perceive, the case of the manufacturer would not be different in principle, who should continue the use of a building which, in the event of a conflagration, would subject his employees to greater risks than would one of different construction. Comparisons innumerable might be made with this case in all the avocations of life.

Now any rule on this subject must be a general rule, and not one to be applied to railroad companies alone. It will be perceived that the risk in the case was such as would affect only the person employed, and that whatever duty was imposed by the circumstances upon any one, could have had reference only to such persons. The case is consequently divested of any question except such as would concern the relation of master and servant, and the same rule would govern the case that would govern, were the question to arise between the farmer, the mechanic, and

the manufacturer, and the persons in his employ. And treating it as a question of such broad application, we do not perceive any ground upon which the plaintiff's case can safely be planted which comes short of this: that the employer is under obligation to his servants, under all circumstances, to make use of the safest known appliances and instruments, and is responsible for any failure to discard what is not such, and to supply its place with something safer.

Any doctrine so far-reaching as this would manifestly be destructive of the general rule, and would almost make the employer the guarantor of his servants' safety in his employ. But under any less serious responsibility it would be impossible to sustain a judgment against this defendant, upon the sole ground of a failure to discontinue the use of this car. In any light in which the question can be viewed, no breach of duty can be charged against the defendant, unless it be the duty to make the employment as safe for the persons employed as was possible. Certainly, in making use of this car, no confidence which was reposed in the prudence and caution of the employee has been betrayed. The difficulties, as has already been stated, were fully known and understood, and the intestate voluntarily continued to encounter the risks.

On the other ground, we find it equally difficult to discover what there was to go to the jury. It was not shown that any complaint was made to the company, or its superintendent, that there was danger in the use of the car, or that any assurances were given that the use would be discontinued. There is no ground on the evidence for a suggestion that the intestate continued in the business because of assurances from any person in authority that this car would be taken off. There is some testimony of complaint made to the mechanic in charge of the Michigan Central Car Shops at Jackson, where the defendant had its repairs made, and of a reply made by him, that the car ought not to be made use of for coupling with the coupler on the other cars; but obviously there was nothing in this to charge the defendant with any assurances, or to affect the case in any manner.

*The judgment must be reversed with costs, and a new trial ordered.*

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## SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1875.]

PATENT. — NOVELTY. — INFRINGEMENT DEFINED AND EXPOUNDED.

SEWALL v. JONES.

To defeat a patent on the ground of want of novelty, the thing relied upon must embody the *substance* of the thing patented. Whatever would be an infringement of the patent will defeat it.

To recommend a method of practising an invention does not make the method a part of the patent.



APPEAL from the circuit court of the United States for the District of Maine.

Mr. Justice HUNT delivered the opinion of the court.

Jones, as assignee of four several patents for a new and useful improvement in preserving Indian corn, brought his action against Clark, the original defendant, alleging infringements of the same. These patents were issued to Isaac Winslow, and were as follows, viz.: No. 34,928, dated April 8, 1862, for "a new and useful improvement in preserving Indian corn;" No. 35,274, dated May 13, 1862, "for a new and useful improvement in preserving green corn;" No. 35,346, dated May 20, 1862, and No. 36,326, dated August 26, 1862.

The two patents last above mentioned were declared and adjudged by the court below to be void, and from this judgment no appeal has been taken. They are no longer elements in the case before us, and are dismissed from further consideration.

The patent first mentioned is for an article of manufacture — a result. The second one is for a process by which a result is obtained. The first is the more full and embraces all that is contained in the second.

The first objection made to the patents is the want of novelty. It is contended that they were anticipated by the Appert process embodied in the Durand patent of 1810; also by the patent of Gunther of 1841, and by that of Wertheimer of 1842. It is an elementary proposition in patent law, that, to entitle a plaintiff to recover for the violation of a patent, he must be the original inventor, not only in relation to the United States, but to other parts of the world. Even if the plaintiff did not know that the discovery had been made before, still he cannot recover if it has been in use or described in public prints, and if he be not in truth the original inventor. *Dawson v. Follen*, 2 Wash. C. C. 311; *Bedford v. Hunt*, 1 Mason, 302.

Durand's patent is described in his specification, enrolled in the English court of chancery, as based "upon an invention communicated to him by a certain foreigner, residing abroad, of the manner of preserving animal food, vegetable food, and other perishable articles a long time from perishing, or becoming useless."

In describing the nature of the invention, and the manner in which the same is to be performed, he says:—

*First.* "I place the said food or articles in bottles of glass, pottery, tin, or other metals or fit materials, and I close the aperture so as completely to cut off or exclude all communication with the external air," and he describes the various means of effecting that purpose.

*Second.* "When the vessels are thus charged and well closed, I place them in a boiler, each separately surrounded with straw or wrapped in a coarse cloth, or otherwise defended from striking against each other. I fill the boiler so as to cover the vessels with cold water, which I gradually heat to boiling and continue the ebullition for a certain time, which must depend upon the nature of the substances included in the vessels, and the size of the vessels, and other obvious circumstances which will be readily apprehended by the operator. Vegetable substances are to be put into the vessel in a raw or crude state, and animal substances partly or half cooked, although these may also be put in raw."

The specification then declares that the inventor did avail himself of the application of heat, by placing the vessel in an oven, stove, steam-bath, or other fit situation for gradually and uniformly raising the temperature and suffering it to cool again, and that as the choice of the consumer, or nature of the said food, or other articles may render preferable, leave the aperture of the vessel, or a small portion thereof, open until the effect of the heat shall have taken place, at which period the same is to be closed.

The points following are embraced in this patent: —

1. It is for the purpose of preserving for a long time animal or vegetable food.

2. The articles thus to be preserved are to be placed in tin or other vessels, so arranged as to exclude communication with the external air.

3. An aperture may be left in the vessel, at the choice of the operator, until the effect of the heat shall have taken place, when it is to be closed.

4. The vessels thus prepared are placed in a boiler filled with cold water, which is heated to a boiling point, which boiling shall be continued for such time as shall be required by the substances contained in the vessel.

5. Although a water-bath is preferred, the inventor declares that he avails himself of heat through an oven, stove, steam-bath, or any other situation fit for gradually raising the temperature and suffering it to cool again.

6. Vegetables are to be put into the vessels in a raw or crude state; animal substances raw or partly cooked.

7. The invention is general in its terms, embracing all vegetables and all animal substances capable of being thus dealt with.

Winslow's patent of April 8, 1862, No. 34,928, is declared to be for an improvement in preserving Indian corn in the green state.

The letters-patent declare that the first "success of the inventor was obtained by the following process: The kernels being removed from the cob were immediately packed in cans hermetically sealed, so as to prevent the escape of the natural aroma of the corn, or the evaporation of the milk or other juices of the same. I then submitted the sealed cans and their contents to boiling or steam heat for about four hours. . . . By this method of cooking green corn in the vapor of its juices, the ends of the cans are bulged out. Strong cans are required, and dealers are likely to be prejudiced against corn thus put up. I recommend the following method: Select a superior quality of green corn in the natural state, remove the kernels from the cob by means of a curved and gauged knife or other suitable means. Then pack in cans, hermetically seal the cans, expose them to steam or boiling heat for about an hour and a half, then puncture, seal while hot, and continue the heat for about two hours and a half." At the close the inventor says that what he claims to secure by the patent is the new article of manufacture, namely, Indian corn preserved in the green state without drying, the kernels being removed from the cob, hermetically sealed, and heated as described.

Let us now state the points embraced in this, the plaintiff's patent, and compare them with the points heretofore stated as included in the Durand patent.

1. Winslow's declared object is the preservation of Indian corn in the green state.

Durand's is for preserving Indian corn not only, but all vegetable substances in their raw or crude state.

2. Winslow recommends removing the kernels from the cob before the process of preservation is commenced, placing the kernels in cans, sealing them and exposing them to heat.

Durand, not limiting himself to the article of corn, provides that the articles to be preserved shall be placed in cans, and subjected to heat in the same manner. He does not stipulate or recommend that the article shall be first removed from the cob, the vine, the twig, or whatever may be the natural support of the vegetable to be preserved, as the corn from the cob, the pea from its pod, the grape or the tomato from its vine, the peach from its stem, the berry from its stalk. Neither does he recommend that it shall not be so removed. His process embraces the article in whatever form it may be presented. It is for the preservation of raw or crude or uncooked vegetables in whatever form they may be presented, and necessarily includes a case where they have been previously removed from their natural support. A prior removal from the stalk would be the natural and, in many cases, a necessary proceeding.

3. Winslow directs that the kernels shall be subjected to the heat for a period of about one and a half hours before puncturing, and for about two and a half hours after the puncturing. The double use of the word about indicates that the time is not to be considered as precisely specified.

Durand directs that the boiling shall continue for such length of time as shall be required by the particular substances contained in the vessel. Corn, peas, tomatoes, peaches, berries, asparagus, may very likely require great difference in the time in which the heat shall be applied to produce the required effect. In each case that is to be the measure of the time.

4. Winslow says other modes may be adopted, so long as hermetical sealing and the use of heat are so managed as to secure the aroma and fresh flavor and prevent putrefaction.

Durand declares that he intends to include in his patent heat through an oven, stove, steam, or any other situation by which the temperature is gradually raised and suffered to cool again.

The same idea is put forth at the close of Winslow's specification, where he declares that what he claims by his patent is the manufacture of Indian corn in its green state, the kernels being removed from the cob, hermetically sealed, and heated.

We are of the opinion that the substance of all that is found in Winslow's patent had, nearly a half a century before he obtained his patent, been put forth in Durand's patent. If Durand's patent were now in force in this country, and a suit brought upon it against Jones, the claimant under Winslow, for an infringement, the right to recover could not be resisted. Durand would show a patent intended to effect the same purpose, to wit, the preservation of vegetables for a long time; employing the same process, to wit, the effect of heat upon vegetables placed in a metallic vessel, the gradual cooling of the same, hermetically sealed after puncture to allow the escape of gases. This is also Winslow's process.

To constitute an infringement, the thing used by the defendant must be such as substantially to embody the patentee's mode of operation, and thereby to attain the same kind of result as was reached by his invention. It is not necessary that the defendant should employ the plaintiff's invention to as good advantage as he employed it, or that the result should be the same in degree, but it must be the same in kind. *Winans v. Denmead*, 15 How. 330.

To infringe a patent it is not necessary that the thing patented should be adopted in every particular. If the patent is adopted substantially by the defendants, they are guilty of infringement. *Root v. Ball*, 4 McLean, 177; *Alden v. Deney*, 1 Story C. C. R. 336.

In an action for infringement the first question is whether the machine used by the defendant is substantially in its principle and mode of operation like the plaintiff's. If so, it is an infringement to use it. *Howe v. Abbott*, 2 Story C. C. 190; *Parker v. Haunth*, 4 McLean, 370.

If he has taken the same plan and applied it to the same purpose, notwithstanding he may have varied the process of the application, his manufacture will be substantially indetical with that of the patentee. *Curtis*, § 312.

Erskine, J., says (in *Walter v. Potter*, Webs. Pat. Cas. 585, 607), the question of infringement depends upon whether the plan which the defendant has employed is in substance the same as the plaintiff's, and whether all the differences which have been introduced are not differences in circumstances not material, and whether it is not in substance and effect a colorable evasion of the plaintiff's patent.

When a party has invented some mode of carrying into effect a law of natural science or a rule of practice, it is the application of that law or rule which constitutes the peculiar feature of the invention. He is entitled to protect himself from all other modes of making the same application, and every question of infringement will present the question whether the different mode, be it better or worse, is in substance an application of the same principle. *Curtis*, § 320.

It is said, however, that a distinction exist in this: that Winslow's patent provides that the corn shall be removed from the cob before the process begins, and that Durand does not specify this idea. If this be conceded, it does not alter the case. Although he may preserve Indian corn by removing it from the cob more advantageously than by letting it remain on the cob, he does it by using the Durand process. He still applies Durand's process of heating, puncturing, and cooling, and no more takes the practice out of Durand's patent than if he should specify that pears or peaches would be the better preserved if their outer coating should be first removed, or that meat could be the better preserved if the bones were previously removed. Whether the improvement or combination could be the subject of a patent, it is not material to consider.

It is said again, that "instead of packing the kernels in the vessels selected for the purpose, in their crude state, as suggested in the English patent, the process patented by the assignor of the plaintiff directs that the kernels should be cut from the cob in a way which leaves a large part of the hull on the cob and breaks open the kernels, liberating the juices, to use the language of the patentee, and causing the milk and other

juices of the corn to flow out and surround the kernels as they are packed in the cans, in such a mode that the juices form the liquid in which the whole is cooked, when the cans are subjected to the bath or boiling water."

This argument is based upon an error in fact. There is no such language in the patent. The sole expression of the patent is to provide, first, that the corn shall be removed from the cob, and second, that it shall be subjected to heat in vessels hermetically sealed. Thus, Winslow recites that difficulty had been encountered by him in preserving the corn upon the cob. This produced an insipid article, and accordingly, he says: "My first success was obtained by the following process: the kernels being removed from the cob, were immediately packed in cans and hermetically sealed, so as to prevent the escape of the aroma, and submitted to heat," &c. There is not a word in the patent to the effect that the kernels shall be cut off in a particular way, or that a large part of the hull shall be left on the cob, nor indeed, that the kernels shall be cut off at all. It is simply provided that the corn shall be removed from the cob. The means are not specified.

Further on, the patentee, Winslow, says: "I recommend the following method." This is not of the substance of the patent. A recommendation is quite different from a requirement. The latter is a demand, an essential, a necessity. The former is a choice or preference between different modes or subjects, and is left to the pleasure or the judgment of the operator. He may adopt it. He will do well if he does. But he may reject it and still accomplish his object by means of the patent.

The principle is this: The omission to mention in the specification something which contributes only to the degree of benefit, providing the apparatus would work beneficially and be worth adopting without it, is not fatal, while the omission of what is known to be necessary to the enjoyment of the invention is fatal. Curtis, § 248.

An excess of description does not injure the patent, unless the addition be fraudulent. *Ib.* § 250.

Accordingly, when the inventor says, "I recommend the following method," he does not thereby constitute such method a portion of his patent. His patent may be infringed, although the party does not follow his recommendation but accomplishes the same end by another method.

But the patentee does not even recommend that the kernels shall be cut off in such manner that a large portion of the hull shall remain upon the cob, nor does he distinctly recommend the cutting off of the kernels in any manner. His recommendation is simply that the kernels be removed by any convenient and suitable method. His language is: "I recommend the following method: Select a superior quality of sweet corn, in the green state, and remove the kernels from the cob by means of a curved and gauged knife, or other suitable means." Any means that are suitable for removing the kernels, whether by knife or any other method, are within this language.

That the simple removal of the corn from the cob, before it is subjected to heat, without reference to cutting it off in such a manner as to leave a portion of the hull on the cob, or without reference to cutting at all, is the claim of Winslow's patent, is clearly shown by another consideration.

The first patent of Winslow and his second patent, as stated in the opinion of the court below, are intended to effect the same purposes—the one being a patent for the article, the other for the process by which the article is produced. “Both patents (it is there said) may be considered together, as all the proofs applicable to one apply equally to the other, and the positions taken in argument are the same in both, without an exception.”

Now, it is quite significant of the intent of the claimant, and of the meaning of the first patent, that his second patent, which is for the process, and would properly be more specific as to every essential mode, makes no claim that the corn shall be removed from the cob by cutting, much less that it should be cut in any particular manner, or with a view to any particular effect. After describing his disappointment in the result when he merely cooked the corn, and in attempting to preserve it when packed, without removal from the cob, or where it was removed after having been boiled on the cob, he says: “Finally I adopted the process of removing the corn from the cob, packing the kernels in cans, hermetically sealing the same, then boiling the cans until the corn contained therein became completely cooked.” The word cutting is not to be found in this patent. Removal from the cob before commencing the preservation, without reference to the manner or means, except only that they should be suitable, is the plain intent of both patents. In this respect they are identical with each other, and are not inconsistent with Durand's patent.

The discovery in question has been of immense benefit to mankind. By means of food preserved in a compact and nutritious form, protected from its natural tendency to decay, deserts are traversed, seas navigated, distant regions explored. It is less brilliant, but more useful, than all the inventions for the destruction of the human race that have ever been known. It is to France that the honor of this discovery belongs, and to Appert, a French citizen. It does not belong to America or to Winslow. Appert's process presents all that we now know upon the subject. It contains absolutely everything of value that is contained in Winslow's patent.

Other grave questions are presented by the record before us. We are satisfied, however, to place our decision upon the ground that the want of novelty in the patents of Winslow is fatal to the plaintiff's right of recovery. We do not discuss the other questions.

The decree of the court below must be reversed, and judgment ordered in favor of the defendant below.

## SUPREME COURT OF CALIFORNIA.

[DECEMBER, 1875.]

CONSTITUTIONAL LAW. — ACTS TO LEGALIZE ASSESSMENTS. — LEGISLATURE CANNOT DENY TO OFFICERS OF MUNICIPAL CORPORATION DISCRETION CONCERNING MUNICIPAL IMPROVEMENTS.

## PEOPLE v. LYNCH.

An assessment that could not have been directly levied by the legislature of a state, cannot be legalized by an enactment of such legislature.

Nor has the legislature of a state the power to deny to the officers of a municipal corporation the discretion which they enjoy under the charter of the municipality concerning municipal improvements.

OPINION by MCKINSTY, J. ; NILES and CROCKETT, JJ., concurring.

The action is an alleged assessment for planking Tenth Street, from J to N streets in the city of Sacramento.

As conclusions of law, the court below found that the order of the board of trustees directing the grading and planking was *void*, because the board did not acquire jurisdiction to make it; that the contract for planking was also void, and that the assessment was void, because the same was not made in pursuance of the city charter. The court further found that all the proceedings had been *legalized* by the act of the legislature, approved March 30, 1874, "to legalize the assessment of a street tax in the city of Sacramento," the first section of which reads: —

"The assessment upon all lots fronting on Tenth Street, between J and N streets in the city of Sacramento, levied on the 20th day of December, 1859, for the purpose of planking Tenth Street, between J and N streets, *is hereby made legal and valid*, and all acts of the board of trustees of said city in relation thereto shall have full force and effect, and said tax so levied upon said lots *shall be a lien thereon until paid*."

For the purpose of the present case, I am willing to admit the entire accuracy of the rule said (by Cooley) to be applicable to statutes passed to cure irregularities in the assessment of property for taxation. "If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity of which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute." Cooley's Const. Lim. 371.

Passing the questions made below as to the *identity* of the assessment which the act attempted to validate, the district court erred in holding that the act legalized the illegal proceedings. And this for three reasons: —

First. The assessment which it attempted to legalize was entirely wanting in the elements of equality and uniformity, according to any standard or system of apportionment, and therefore could not have been directly levied by the legislature.

Second. In California, the power of "assessment" — distinguished

from that of taxation as ordinarily employed — cannot be directly exercised by the legislature, within the limits of an incorporated city.

Third. The inhabitants of a city cannot be deprived of their right to have such matters passed upon by their representatives in the city council as are placed by the charter under the supervision and control of the legislative department of the city government. The legislature cannot, in a special case, deny to the proper city authorities that discretion which they may ordinarily employ with respect to local improvements.

I. As I understand it, the court below distinctly found that a lot of land, within the district declared by the charter and law to be benefited by the alleged improvement, was not assessed at all. Assuming that the act (in connection with the charter an attempted assessment) is to be read as if it, in terms, declared that public work had been done, which was of benefit to the same property which would have been benefited if the work had been regularly ordered, it assesses all the lots within the district benefited, except certain lots which it releases from liability for the benefit received.

An "assessment" for a local improvement is a *tax*, differing from other taxes in that it need not be levied upon the *ad valorem* principle. Although such assessment is not prohibited by that clause of the state Constitution which provides that "all property shall be taxed in proportion to its value," it is of the very essence of taxation, *in every form*, that it be levied with equity and uniformity, and to this end, that there should be some system of apportionment. *Taylor v. Palmer*, 31 Cal. 240. These assessments may be apportioned by reference to the number of feet fronting on the improvement, or to any other standard which will approximate exact equality and uniformity; but whatever the basis of taxation, the requirement that it shall be uniform is universal, the difference being only in the character of the uniformity. The terms "tax" and "assessment" (except in the case of specific taxation), both include the idea of some ratio or rule of apportionment, so that, of the whole sum to be raised, the part paid by one piece of property shall have some known relation to, or be affected by, that paid by another. *Woodbridge v. Detroit*, 8 Mich. 276; *People v. Mayor of Brooklyn*, 4 N. Y. 419.

Abstractly, the idea of taxation involves the distribution of the burden — with equality and uniformity — upon all the property throughout the state, or district; but it was said in *Merritt v. Farris*: "The Constitution in its application to the various departments of the government, and to individual rights, must receive such a construction as to give it a practical operation." 22 Ill. 311. And, in the same case: "The framers of the Constitution could not have designed that such an omission" (to assess an individual, or particular property) "should avoid the tax levied on the property which is regularly assessed. *They intended to require, and did require, that the law should provide for a uniform mode of assessment and collection, which would not sanction exemption from the burdens of taxation*, and they impose the duty upon the officers acting under the revenue laws of executing them fairly and impartially; but it never could have been intended that their omissions should render the whole tax void, and suspend the collection of revenue. If an officer wilfully and corruptly, or from gross negligence, were to



make such omissions, he would doubtless be liable in damages to those suffering injury. p. 312. And it was there held, that the omission of the district clerks to place on the tax-roll the names of certain property holders within a school district, did not vitiate the whole tax.

Elsewhere—and the difference seems to be recognized by the weight of authority in other states—a distinction is made between mistakes of fact, erroneous computation, or errors of judgment, by those to whom the execution of the taxing laws is intrusted, and the *intentional disregard* of such laws in such manner as to impose illegal taxes on those who are assessed. In *Weeks v. Milwaukie* (10 Wis. 256), Paine, J., speaking for the court, after declaring a rule based on the foregoing distinction, and that where mere mistakes occur on the part of officers who are endeavoring, in good faith, to discharge their duties, they ought not to invalidate the whole levy, adds: "It seems to me the other part of the rule is equally essential for the protection of the citizen. If those executing these laws may deliberately disregard them, and assess the whole tax upon a part only of those liable to pay it, and have still a legal tax, then the laws afford no protection, and the citizen is at the mercy of those who, by being appointed to execute the laws, would seem to be thereby placed beyond legal control. I know of no considerations of public policy or necessity that can justify carrying the rule to that extent."

In the present case (whatever may be the rule as to executive officers, such as assessors, charged with duties ministerial in their character) it is unnecessary to go further than this: The constitutional limitation that taxation shall be equal and uniform, including the proposition that by the law levying it, it shall be a burden on all property similarly affected, or in the same relation to the purpose of the tax and to the taxing power, applies with full force to the action of the legislature. While, therefore, if a law shall provide for a tax in conformity to the Constitution, errors in judgment on the part of the agents appointed to assess (or even intentional omissions) may not invalidate the whole levy; an attempt by the legislature to release certain property from its proportion of the tax would be of non-effect.

In *Crosby v. Lyon*, 37 Cal. 243 (where the tax had actually been assessed and collected of the company), it was held that a statute providing for a return to the railroad company of its part of a school tax lawfully levied within a county was in contravention of the section of the Constitution which declares that taxation "shall be equal and uniform," &c. And in *People v. McCreery* (34 Cal. 432), this court decided that the legislature had no power to exempt from taxation any private property in this state. In that case the judgment did not invalidate the entire levy, because, as was held in effect, the attempted exemption only was void, and the assessors were authorized to assess the property which the statutes pretended to exempt; and, although it was the duty of the assessor to assess all the property in his district, his omission to assess part, under the circumstances, did not render his whole action void.

But the Act of March 30, 1874, contains no provision for a future assessment by any officer or agent of the state of the property within the district declared by the legislative recognition of the proceedings under the

charter to have been benefited by the improvement of Tenth Street, or of the lots omitted in the attempted assessment which it was the object of the act to validate. The act — if it be retroactive at all — must be the same as if it had declared certain tracts of land to have been benefited by the local improvement, and had further enacted that parts of the tracts should pay the whole cost. It has been repeatedly held, that an attempt by the legislature to compel each lot upon a street to pay the whole expense of grading and paving along its front cannot be maintained, because while there is an apparent uniformity, the measure of equality required by the Constitution is entirely wanting. 9 Dana, 513; 8 Mich. 274. It is far more clearly a violation of the constitutional principle of equality and uniformity to require of one lot, or any number less than all, to pay for all within an assessment district.

In the case at bar, the assessment, such as it was, was completed prior to the curative act, so called. The legislature attempted to ratify that very assessment, with all its imperfections on its head, including the defect, that part of the property within the assessment district had not been charged at all. This cannot fairly be treated as a law providing for a levy of an assessment within a certain district, and appointing officers to make it, whose errors, perhaps, might not vitiate the entire levy. This act, at best, is an attempt directly to levy a contribution within a certain district; to declare that each lot named shall pay a sum, arbitrarily fixed, as its portion thereof, and that particular lots shall pay nothing. Such a statute, if prospective, would undoubtedly be invalid, as clearly a violation of principles recognized and established by the Constitution of the state.

II. The power of "assessment" cannot be directly employed by the legislature within the limits of any incorporated city.

In *Taylor v. Palmer*, *supra*, it was said: "It is true that the power of assessment is vested in the legislature, but it is so in a modified sense. It is not so vested as an independent or principal power, like that of taxation, but as a part of, and as an incident to, the power of organizing municipal corporations, and providing for them a system of government, to the proper working of which the power of assessment is indispensable. It was not intended that the power of assessment should be exercised by the legislature, and it never can be, except through the intervention of a municipal corporation; for, whenever the legislature undertakes to exercise the taxing power directly, it works under the power of taxation as distinguished from that of assessment."

And again: "It results that the legislature not only may grant, but must grant, to one of its creatures a power which it is not permitted to exercise in its own capacity, or, to observe greater exactness, the privilege of exercising the power of taxation for certain purposes in a mode in which the legislature is forbidden to exercise it." p. 253.

The foregoing language is to be construed with reference to the facts of the case then before the court. The learned judge who delivered the opinion in *Taylor v. Palmer* was discussing the power of "assessment" *within a city*, and the conclusion was, that within corporations strictly municipal, the power cannot be directly exercised by the legislature. Thus construed, the case of *Taylor v. Palmer* accords with the subsequent

ruling in *Hagar v. Supervisors of Yolo* (47 Cal. 234), where it was held that, outside of such municipalities, the legislature might authorize the employment of the power by local boards.

This power of "assessment" is only mentioned in the Constitution in that section which provides for the organization of cities and incorporated villages. Art. 4, sec 37. It is spoken of as a power of municipal government, familiarly known and well understood, both by the framers of the Constitution and by the people at large; and the legislature is commanded to restrict the power "so as to prevent abuses in assessments." It is a power which, from its very nature, can only be prudently employed by those in whom it is exclusively vested. Bearing this in mind, the language of the section above referred to, which provides for the prevention of abuses by legislative restrictions, would seem fully to justify the conclusion reached by the court in *Taylor v. Palmer*, that the power of assessment can only be exercised through the medium of the corporate authorities.

Conceding, therefore, the principle bearing upon retrospective laws to be as claimed by respondent, the legislature could not originally have levied the assessment, which they attempted to validate by subsequent acts.

III. The legislature cannot deprive the city council, or other legislative body, of all discretion with respect to a local improvement within the limits of a city, when by the charter the matter of such improvements is confided to the judgment and discretion of the local body.

First. Before proceeding to the consideration of this last point, I propose to indicate what I conceive to be an erroneous view in respect to the exercise by the courts of the power of declaring statutes in conflict with the state Constitution.

It is often assumed, and sometimes asserted, that it is the duty of the judges to sustain, by strained interpretation, a law, which at first view is in apparent derogation of that instrument. I concede that a court should hesitate to declare a law unconstitutional, as it should to render any decision involving important consequences only after due deliberation. But on the other hand, the judges may not indulge an indisposition to assume responsibility by falling back upon *phrases*, used by jurists, however distinguished, which, fairly construed, mean only that great caution is to be employed in this, as in other judicial action.

Since the case of *Sharpless v. The Mayor, &c.* (Penn. St. 147), perhaps no argument has been made in favor of the constitutionality of a statute in which the language of the Chief Justice of Pennsylvania has not been quoted: "We can declare an act of the assembly void only when it violates the Constitution clearly, plainly, and in such manner as to leave no doubt or hesitation in our minds." Yet it is manifest that the accumulation of adverbs and clauses, while it may give euphony to the sentence, adds no force to the meaning, which remains the same as if the able judge and brilliant writer had said that a court must be clearly satisfied that a law is unconstitutional before it can declare it to be so.

He certainly did not mean that a statute should be upheld, whenever a doubt could be suggested that it might be constitutional; for this would be an abdication of the judicial functions of determining the validity or

invalidity of statutes on that ground. The court cannot shirk the responsibility of deciding such questions, when presented; it is as much their duty to consider the Constitution, in ascertaining what is the law, as to consider the statute. This duty must be performed, whatever the consequences.

"The judicial department is the proper power in the government to determine whether a statute be or be not constitutional. The interpretation or construction of the Constitution is as much a judicial act, and requires the exercise of the same legal discretion, as the interpretation or construction of a law. To contend that the courts of justice must obey the requisitions of an act of the legislature, when it appears to them to have been passed in violation of the Constitution, would be to contend that the law was superior to the Constitution, and that the judges had no right to look into and regard it as a paramount law."

"The attempt to impose restraints upon the exercise of the legislative power would be fruitless, if the constitutional provisions were left without any power in the government to guard and enforce them." 1 Kent's Com. 449.

However apt the expression, "beyond all reasonable doubt," when referred to the action of a jury upon an issue of fact in a criminal case, the words have no peculiarly appropriate application to the action of a court upon any issue of law; since, in theory, every adjudication is made after full consideration of all doubts of its correctness.

Nor is it true that we can never hold a law void, unless we can find in the Constitution some specific inhibition which in precise language refers to the particular law. Human ingenuity would fall short of anticipating every possible mode by which might be consummated an abuse of legislative power, which the people in constitutional convention desired to guard against. The providence of constitution makers must find expression in broader terms; but whether restrictions on the legislative power be declared as general and affirmative propositions, or appear as necessary inferences from a comparison of different portions of the Constitution, it is equally the province of the courts to determine whether a particular law falls within any of them. It is not for the judiciary primarily to inquire whether the legislature has violated the *genius* of the government, or the principles of liberty, or rights of man, or whether its acts are expedient, but only whether it has transcended its powers. Dwarries on Statutes, 269. It does not result, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the Constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Cooley's Const. Lim. 171.

Under our Constitution the senate and assembly can perform any legislative act (not prohibited), not because there is any magic in these names which absorbs all power not specifically conferred on the other departments of government, but because the Constitution places the legislative power in the senate and assembly in general terms. By the Tenth Amendment of the Constitution of the United States, it is provided: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The government of the United States can exercise only such

powers as are expressly granted to it, and such as are necessarily implied from those granted. It follows from this, that the people of the states respectively retain such powers as have neither been granted, expressly or by implication, to the government of the United States, nor conferred on the state government.

It is by no means a corollary from the foregoing proposition, however, that *one department* of the state government may employ all the powers not granted to the federal government. It is undoubtedly true, in a certain sense, that the state Constitution is to be construed as a *limitation* upon and not as a grant of legislative power; that is to say, the general power of making laws having been placed by the people in the legislature, the legislature will be held to have the power to make any law which it is not prohibited from making by the Constitution of the state, or of the United States. In this respect the rule of interpretation is the reverse of that applicable to acts of Congress under the Constitution of the United States. But the "sovereignty of the people" is more than a meaningless phrase.

The people of California created the state government, and it was for this people to place (in the state Constitution) as many checks upon, and conditions and limitations of the general grant of legislative, executive, or judicial power, as they deemed proper or expedient. "The people of the state alone possess and can exercise supreme and absolute authority; the legislature, as the other departments of government, are but the depositories of delegated powers more or less limited," — according to the terms of the Constitution. 1 Sharswood's Black. Com. ch. 2, note.

The Constitution of California is more than a collection of suggestions or "directory" clauses as to the employment of the powers of legislation by a body, which, like the Parliament of Great Britain, is omnipotent. It purports to contain, and does provide, an entire framework of government. It divides the powers of this government into three departments, no one of which is freed of the restrictions declared or necessarily implied from the instrument as a whole. We are to ascertain the meaning of the Constitution by an examination of all of it; and in making such examination, effect is to be given, if possible, to every section and clause. It is not to be supposed that any words have been employed without occasion, or without intent that they should have effect as part of the law. Cooley's Const. Lim. 58. The real question in the construction of the Constitution, as in the construction of a statute or of a contract, is, what is meant by the language employed? We should read it with a view to finding out the *thoughts intended to be expressed*. *People v. Blodgett*, 13 Mich. 138. In interpreting separate clauses, we must presume that words have been used in their ordinary sense. *Gibbons v. Ogden*, 9 Wheat. 1. But we should see if the meaning of any one clause is qualified or illustrated by other clauses. If words are used which are employed in a certain sense in the constitutions or statutes of other states (adopted or enacted prior to our own), it is proper to consider them as employed in the same sense in our Constitution, unless the context indicates that they were intended to convey a different idea. *Taylor v. Palmer, supra*; *Ex parte, Wall*, 48 Cal. 279. When the intent is not perfectly obvious from the language, we may regard the evil intended to be prevented, if discoverable

in the history of legislation in this and other states ; in short, if a law is to be tested by the Constitution, " It is the duty of the court to make such a decision as accords with its carefully formed and settled conviction, after using all accessible means of enlightenment." *People v. Blodgett, supra.*

Second. Bearing in mind the principles of construction above mentioned, I proceed to inquire, what did the framers of our Constitution mean, when, after declaring in general terms that the law-making power should be vested in the senate and assembly, and requiring the establishment of a system of county and town governments, they further provided : —

" It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrain their powers of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debts by such municipal corporations." Art. 4, sec. 37.

" Each county, town, city, and incorporated village shall make provision for the support of its own officers, subject to such restrictions and regulations as the legislature may prescribe." Art. 11, sec. 9.

Had the Constitution of California been silent in respect to cities and incorporated villages, the legislature would have possessed the power to create them ; but it would have been more difficult to say whether the people could not have been deprived of these local governments. So impressed, however, were the framers of that instrument with the propriety and necessity of such legislation, that they inserted the sections above quoted. *What did they have in their minds* when they spoke of cities and villages ? It needed but to recall their origin and history to impress the constitutional convention with a conviction that municipalities are invaluable to a great or free people. The enlightened genius of the Roman civilization was planted and fostered by the establishment of colonies with urban privileges. In the "dark ages" the chartered towns in Europe served to curb the turbulence of the more potent of the crown vassals, and to erect barriers for the protection of personal rights against the rude force of the feudal barons. It often happened that from such centres of self-government the spirit of freedom was extended and expanded ; and it may safely be said of the English *boroughs*, for example, that they were largely instrumental in developing the constitution of government which made that people jealous of the liberty they possessed, and capable of receiving still greater accessions of the same blessing. In our own country the existence of local political corporations began with the earlier settlements of the colonies. The benefits of such subordinate communities, as schools of preparation for the discharge by the citizen of the duties he owes to his country at large, have been highly estimated by philosophical writers, who have given their attention to the subject ; the distinguished author of "*La Democratie en Amerique*" considering the New England "towns" — which are like cities in so far as they possessed certain powers of government — as the very life of American liberty. The advantage of having the home work done at home commends itself to every mind. The extreme inconvenience, to say the least, of an interference on the part of the state, by special legislation, with the innumerable details

of administration in every locality, especially in the more densely populated portions of our territory, is manifest to all practical men. If there is danger in a city that the indifference of the more honest and intelligent may suffer the corrupt to seize and abuse the local authority, this risk equally exists with reference to the state or national government. To a certain extent, the danger that people may neglect their public duties exists everywhere, and can only be guarded against by greater diligence: it is an incident to our form of government, — the price which we pay for our inestimable freedom. Assuming that the people of a municipality are fit to govern themselves, no one can hesitate to believe that any possible contingent evils of municipal government are more than compensated by the direct representation in the local councils of those peculiarly and often exclusively, interested in the conduct of the municipal affairs. It was amongst other things to do away with frequent interference by the central power with matters of purely local concern, that cities and incorporated villages had been created in every state of the Union.

All these considerations may be supposed to have been present to the minds of the members of the constitutional convention. When they required that the legislature should organize cities and villages, they were doubtless actuated by a sense of the vast consequences of such corporations, entering as they do into the foundation of our political economy.

A system of territorial subdivisions and municipal organizations existed in California when our Constitution was adopted. But a very large majority of the inhabitants of California, as well as of the members of the convention, were recent immigrants from states where the common law prevailed as the basis of jurisprudence, and it was to the cities and villages, there in operation, that reference was made in the clauses of the Constitution. The convention used the terms as they had been used throughout the United States, when employed at all; and the very idea of an American city involves the notion of a local government; of local officers selected by the inhabitants, and reflecting the wants and wishes of the inhabitants; and that these officers should exercise their own judgments in respect to the internal affairs committed to their charge by law of their creation. The legislature can alter or repeal a city charter, but it does not follow that the legislature can deprive the aldermen, councilmen, supervisors, and trustees of a city of all discretion in the discharge of their functions as such.

In *Ex parte Wall, supra*, we held that the words, "system of county and town governments," referred to county and town governments in their general features, like those of the states where county and town governments had been established. It is equally plain that the "cities and incorporated villages" required to be created by our Constitution are cities and incorporated villages with *franchises* similar to those enjoyed by municipal corporations in other states. From the very nature of such corporations, and from what has already been said as to the intent of the Constitution, that the legislative body of a city shall exercise choice and judgment with reference to expediency of action in matters appropriately confided to their care, it would seem to follow that the legislature has no reserved power to set aside such choice or judgment, or to supersede the employment thereof in a particular instance.

As is said by Chief Justice Campbell, in *People v. Hurlburt* (24 Mich. 87), "We must never forget, in studying the terms of the Constitution, that most of them had a settled meaning before its adoption. Instead of its being the source of our laws and liberties, it is, in the main, no more than a recognition and reenactment of an accepted system. The rights preserved are ancient rights, and the municipal bodies recognized in it, and required to be perpetuated, were already existing, with known elements and functions. They were not towns, or counties, or villages, in the abstract, — or municipalities which had lost all their liberties by central usurpation, — but American cities," &c. In the same case Mr. Justice Cooley — than whom no more distinguished expounder of Constitutional law is recognized in this country — said: "We must assume either an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental principles in our general framework of government which are within the contemplation of the people, when they agreed upon the written charter, subject to which, the delegation of authority to the several departments of government have been made. That this last is the case appears to me too plain for serious controversy. The implied restrictions upon the power of the legislature, as regards local government, though their limits may not be so plainly defined as express provisions might have made them, are, nevertheless, equally imperative in character, and whenever we find ourselves clearly within them, we have no alternative but to bow to their authority. The Constitution has been framed with these restrictions in view, and we should fall into the grossest absurdities if we undertook to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations. The circumstances from which these implications arise are: First, that the Constitution has been adopted, in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country, never for a moment suspended or displaced, and the continued existence of which is assumed; and second, that the liberties of the people have generally been supposed to spring from and be dependent on that system." 97-8.

The state legislature may perhaps provide for an inquiry, in the first instance, into the propriety and feasibility of a project affecting exclusively the interests of the people of a city by persons or officers other than members of the local legislature. There may be no serious objection to this, provided the action of such persons is merely advisory. But the definite and ultimate determination, which shall conclude the tax-payers of a city, must be that of the appropriate local legislature. This question was fully considered in the *People v. Common Council of Detroit*, 28 Mich. 228. The Legislature of Michigan had passed an act appointing a board, who by the terms of the law had absolute power to purchase lands for a park in the city of Detroit, and on whose report the common council were commanded to make provision to pay for the land, by issuing bonds, &c. The supreme court of that state held the law to be unconstitutional, as being an attempt to transfer to a board appointed by the legislature a discretion which the common council alone could be authorized to employ.

The argument there on the part of the relators — the Park Commis-



sioners — was : As the state may create and abolish municipal corporations, and defines and limits their power at will ; as it confers, amongst others, the power to make contracts and to levy taxes for their performance, it may do directly what it may do indirectly ; it is not limited to conferring a discretionary power, but may command the municipal legislature to make a particular contract, and compel it to levy taxes to satisfy the obligation assumed by the state for the local government. But the court held, in effect, that under the Constitution of that state, the legislature could only create cities with municipal legislatures elected by the inhabitants, or some of them, with discretionary power in respect to the matters of a local character committed to their charge. Similar views were expressed by the supreme court of Illinois in *People v. Mayor of Chicago* (51 Ill. 17), that court holding : “ While it is conceded that municipal corporations, which exist only for public purposes, are subject at all times to the control of the legislature creating them, and have in their franchises no vested right, and whose powers and privileges the creating power may alter, modify, or abolish at pleasure, yet that power cannot be so used as to compel such a corporation to incur a debt without its consent, to issue its bonds against its will for the erection of a public park, or for any other improvement.”

An attempt by the state legislature to order an improvement within the limits of an incorporated city, and to levy an assessment to pay for it, is as clearly a violation of the independence of action guaranteed by the Constitution to the local legislative assembly, as is a mandate directed to that assembly, commanding them to make such improvement, and to borrow money, or to tax all, or a portion, of the citizens to pay for it, contrary to the wish of the assembly, and to that of the local community whom they represent. Such a law is unconstitutional, because it is mandatory in its nature, and deprives the board of trustees, or legislative department of the city government by whatever name it be known, of all choice or discretion in reference to the improvement.

There is no force in the suggestion that the doctrine here asserted will lead to a nullification of general laws, or to a communism as objectionable as an extreme centralization.

There is a clear distinction between the functions of officers whose jurisdiction is limited, territorially considered, as agents of the people of the state, and as agents of the people of the municipality. The only confusion existing on this subject has arisen from the custom, prevalent under all free governments, of localizing matters of public management, so far as possible, and of making use of local corporate agencies, whenever it can be done profitably, not only in local government, where it is required by clear constitutional provisions, but also for purposes of state.” Campbell, J., in *People v. Common Council of Detroit, supra*. “ It is important to bear in mind the distinction between state officers — that is, officers whose duties concern the state at large and the general public, although exercised within definite territorial limits — and municipal officers whose functions relate exclusively to the particular municipality.” Dillon on Municipal Corporations, 23. The same individual may unite in himself capacities of a state and municipal officer, but as for matters in respect to which he acts for the state, he is not a city officer but a state officer.

There is nothing in the nature of things which precludes us from declaring that an officer in his municipal capacity may be clothed with functions and be entitled to immunities with which he is not vested, and which he cannot claim as agent of the state at large.

Third. I think this court is not estopped from responding to the question last considered in such manner as shall accord with our convictions of what the law demands.

Our attention has been called to *San Francisco v. Certain Real Estate* (July term, 1872), as precluding the further consideration of that question. In that case no opinion has been reported. It was decided from the bench on the supposed authority of *Blanding v. Burr*, 13 Cal. 343; *People v. San Francisco*, 36 Cal. 595; *Sinton v. Ashbury*, 41 Cal. 530; *San Francisco v. Certain Real Estate*, 42 Cal. 515; *San Francisco v. Canavan*, and *Hotelling v. Canavan*, *Ib.* 541.

Taking up these cases in a reversed order, I find the main question, of itself decisive of the cases discussed in *San Francisco v. Canavan*, and *Hotelling v. Canavan*, is the character of the title to Pueblo lands, the court saying: "The authorities cited completely establish that the tenure by which these lands are held is totally different from that by which lands acquired by a municipality, by gift or purchase, are ordinarily held; and whatever may be the extent of the legislative power over the latter class of lands, there can be no doubt that in respect to Pueblo lands it is competent for the legislature to control and direct how they shall be managed and controlled, or disposed of by municipal corporations." In respect to the subject suggested by the question we have been considering, no argument was made by court or counsel in *San Francisco v. Canavan*, nor is that subject referred to in *San Francisco v. Certain Real Estate*, *supra*.

In *Sinton v. Ashbury*, it seems to have been conceded by counsel that the legislature has power by special act to direct and control the disposition of the funds or property of a municipal corporation for a municipal purpose. 41 Cal. 530. With the premises conceded, of course the court in that case had only to ascertain whether a certain purpose was municipal. *People v. San Francisco* determines a particular statute to be mandatory, — the only point discussed by counsel, — and assumes the power to pass such mandatory statute. Thus it is seen that of the cases cited in *San Francisco v. Certain Real Estate* (July term, 1872), all the others rely on the reasoning of *Blanding v. Burr*, *supra*. And this is also true of *Creighton v. San Francisco*, 42 Cal. 446. But before commenting on *Blanding v. Burr*, it will be well to refer to others cited in *Sinton v. Ashbury*, *supra*. They are: *People v. Alameda*, 26 Cal. 650, and *Beals v. Amador*, 35 Cal. 632, which also depend on *Blanding v. Burr*; *People v. McCreery*, which has no immediate bearing on any point involved in the present controversy; *Sharp v. Contra Costa Co.* 34 Cal. 284, wherein it was held that a county could not be sued in the absence of a statute authorizing such suit; and *People v. Board of Supervisors*, *fcc.* 11 Cal. 206, where the court says: "The interesting question argued at the bar as to the extent of the power of the legislature over the finances of the municipality does not arise in this case."

In respect to *Blanding v. Burr*, I remark: —

(a.) We can agree to the judgment in that case without assenting to the views presented in the opinion of the court.

Burr, one of the board of fund commissioners, refused to sign certain bonds to be delivered to the relator, in the amount of a claim in his favor against the city, allowed by the board of examiners. Burr took the ground that the claim should not have been allowed, inasmuch as the common council had no power to create the liability, having already (when relator's claim accrued) created an indebtedness of more than \$50,000 beyond the annual revenue, and he relied on a clause of the city charter, which reads: "The common council shall not create, nor permit to accrue, any debts or liabilities which, in the aggregate with all former debts and liabilities, shall exceed the sum of \$50,000 over and above the annual revenue of the city," &c. The point made by the defendant in that case decided against him: it would not have been necessary to determine that the legislature had power to compel a municipal corporation to provide for the satisfaction of a supposed obligation which was incapable of enforcement at law or in equity. It is true the court did not decide the point made by Burr, but, on the contrary, declared it unnecessary, in their view of the case, to construe the clause of the statute. But the same clause was thus treated in the able opinion of Mr. Justice Cope, in *Argente v. San Francisco* (18 Cal. 264): "We regard this opinion as directory to the common council, and not as a limitation upon the power of the city. It was too indefinite and uncertain to admit of any other construction. Of course, the amount of the annual revenue of the city was incapable of ascertainment in advance of its collection, and it could not have been intended that a debt contracted by the city should be valid or invalid, as the revenue of the year might exceed or fall short of a particular amount." And in *Babcock v. Goodrich* (47 Cal. 513), this court held a similar provision as to the power of supervisors (Political Code, section 4970) to be directory, simply saying, "The word revenue, as used in the section, cannot mean the actual money which shall be received in the county treasury. . . . It is the estimated revenue which the law-makers had in contemplation. It is their estimate of the revenue at the time an account is presented which must control the action of the board."

(b.) It is here to be observed, also, that in *Blanding v. Burr*, it was assumed that the only constitutional restriction upon the power of the legislature to tax, and dispose of the proceeds of taxation, is to be found in the 11th article of the Constitution, — that which provides for equality and uniformity. The court did indeed refer to that portion of the 37th section of article 4, which enjoins upon the legislature the duty to restrict cities and incorporated villages in their powers of taxation and contracting debts, and held that this only imposes the obligation on the legislature to prevent abuses in assessments and in contracting debts, and does not prohibit the conferring of new and enlarged powers on municipal governments. The same view of that question was taken in *Grant v. Courter*, 24 Barb. 233. But, in *Blanding v. Burr*, the court does not seem to have addressed itself to the broader question which has now been considered, and which may be stated thus: Do the constitutional provisions which require the establishment of cities and incorporated villages, construed in the light of the history of such municipalities and the traditions of our people, restrict the general powers of the state legislature, so

that they can neither compel a city to create a debt or levy a tax for a particular city purpose, nor directly intervene to levy an assessment on the property of the whole body, or a portion of the citizens, for a particular municipal improvement."

Nor was this question discussed in the New York cases especially referred to in *Blanding v. Burr*.

The statute decided to be constitutional in *People v. The Mayor of Brooklyn, supra*, was a statute authorizing a municipal corporation at the discretion of its officers to employ the powers of assessment, &c. And in the town of *Guilford v. Chenango Co.* 18 Barb. 615; 13 N. Y. 148, the courts held that none of the constitutional provisions relied on by counsel constituted a prohibition of the act compelling the supervisors of Chenango County to levy a tax for the purpose in the act indicated upon the inhabitants of the town of Guilford. The constitutional objections urged against the act, and which were held to be invalid, were: 1. That the title was informal. 2. That the act was an assault on private rights. 3. That it was an attempt to deprive citizens of their property without due process of law. 4. That it was an attempt to exercise judicial functions.

It may be further said, in reference to the town of *Guilford v. Cornell*, that the court of appeals placed peculiar stress upon a provision of the New York Constitution, which seems to authorize an appropriation for local purposes by a vote of two thirds of the members of each branch of the legislature (art. 1, sec. 9), Mr. Justice Denio saying, "There is no question but that this law received the requisite vote." 13 N. Y. 149.

(c.) If the precise question which has been herein considered had been passed upon in *Blanding v. Burr*, this court would not be estopped from considering it anew. It has happened in the history of states that the framers of a constitution have been more provident than perhaps themselves understood, certainly than judges at first view have supposed, and have actually provided checks against evil legislation, which was subsequently assumed not to be prohibited. If, after events have made apparent the enormity of an evil, and upon fuller consideration a court is satisfied that a former judgment is wrong, it ought not to be precluded from asserting the correct rule, unless some principle of public policy shall intervene; as when the establishment of the true rule would so disturb vested interests as would constitute a greater evil than would result from holding fast by the former decision. No such consequence or deprivation of any considerable property rights has been suggested as the result of returning to what I conceive to be the correct construction of the Constitution. The views of this court upon the doctrine of *stare decisis* are fully set forth in *Hart v. Burnett*, 15 Cal. 530. It cannot be contended that the conclusion to which I have arrived will be any violation of that doctrine as then explained.

Judgment reversed and cause remanded, with direction to the court below to enter judgment for the defendant.

WALLACE, C. J., concurring. An assessment, through whatever agency it be levied, is a tax, and it is therefore essential to its validity that it proceed upon some ascertained basis of uniformity. The assessment under consideration, as levied in the first instance, did not proceed upon such a basis. As originally levied, it omitted and exempted certain

premises lying in the assessment district from the burden which it imposed upon the other premises in that district. As subsequently attempted to be validated by the Act of March 30, 1874, this omission and exemption was still preserved and retained.

The "thing wanting," both before and after the passage of that act, was uniformity, and for this reason the assessment was not aided by the legislative act referred to.

Had the act been general and prospective, instead of special and retrospective; had it undertaken to provide for assessments of this character to be levied thereafter, not upon a prescribed basis of uniformity, — an assessment levied in conformity therewith would have been void. It is not in the legislative authority to dispense with the required uniformity, whether by prospective acts providing for assessment to be levied in the future, or retrospective acts seeking to impart a validity to assessments already levied.

For these reasons I concur in the judgment, upon the ground first discussed by Mr. Justice McKinstry.

RHODES, J., concurring. I concur in the judgment for the reasons expressed by the chief justice, but I am unable to concur with Mr. Justice McKinstry in the conclusions announced upon the second and third grounds discussed by him. Some of the propositions laid down by him might, perhaps, with propriety, have been accepted and applied at the commencement of the judicial history of the state, as sound rules and maxims in the construction of our Constitution, and others, perhaps, are deserving of a place in the instrument itself; but at an early day a different construction was adopted in respect to the power which the legislature might exercise over municipal corporations, and in respect to persons and property within their territorial limits, until now many and valuable interests are held which had their origin in, and are now dependent on such construction; and in my judgment that construction ought not to be changed except upon more cogent reasons than are presented in this case. I am not prepared at this time to enter upon a discussion of these important questions; but it is not improper to say that there are no reasons upon which it should be held that the power of the legislature over the matters of "assessment" within municipal corporations are limited, that will not equally apply in respect to the power of the legislature over the matters of borrowing money, contracting debts, or taxation for municipal purposes, mentioned in sec. 37, art. 4, of the Constitution. The grounds upon which the authority is denied to the legislature to direct a particular assessment within a municipal corporation to be levied, would also prohibit the legislature from requiring that a particular debt should be contracted by the municipality, or a particular tax levied for municipal purposes. If a change in these important provisions is necessary or desirable, it should, in my opinion, be made in the organic law itself, and not by means of a change in its construction.

## SUPREME COURT OF OHIO.

(To appear in 25 Ohio State.)

## HUSBAND AND WIFE. — EVIDENCE. — CONVEYANCE IN FRAUD OF CREDITORS.

## WESTERMAN v. WESTERMAN.

1. Under the amendatory act of April 18, 1870 (67 Ohio L. 113), husband and wife are competent witnesses for and against each other, except as to communications made by one to the other, and acts done by one in the presence of the other during coverture, and not in the known presence of a third person.
2. And the act is applicable to cases pending and causes of action existing at the time of its passage, notwithstanding the provisions of the Act of February 19, 1866 (S. & S. 1), declaring the effect of appeals and amendments.
3. Evidence that a third person was present, and known to be present, at the time of making such communications, or doing such acts, is for the court and not for the jury, and, on error, will be presumed to have been given to the court, unless the contrary appears.
4. Where a motion is made to exclude the entire testimony of a witness, part only of which testimony is incompetent, without specifying any particular part of the testimony objected to, or disclosing the ground of objection, it is not error in the court to overrule the motion.
5. Under the Act of May 1, 1851 (S. & S. 389), as amended March 23, 1866 (S. & S. 391), the separate property of the wife is *primarily* liable, as between her and the husband, for the satisfaction of judgments recovered in actions brought against them upon causes existing against her at their marriage; and the husband, when compelled to pay any such judgment, becomes, in equity, a creditor of the wife to the amount paid, and entitled to charge the same upon her separate property, and for that purpose to set aside fraudulent conveyances thereof made in contemplation of marriage.
6. A creditor may avoid or set aside a fraudulent conveyance of his debtor's property for the satisfaction of his debt, without first exhausting the debtor's other property, or showing that the debtor has no other property liable to be taken.

ERROR to the superior court of Montgomery County.

Henry Westerman is the husband of Elizabeth Westerman, and John F. and Joseph O'Neal are her sons by a former husband. Shortly before her marriage to Westerman, which took place on the 16th day of September, 1867, and after she had contracted to marry him, Mrs. Westerman made a deed of gift to her said two sons of two tracts of real estate, of which she was seised in fee, and upon which part of the purchase money still remained due to her brother, from whom it had been purchased. Subsequently to the marriage, this balance of purchase money was collected by the brother from the husband, in an action brought by him against the husband and wife. The husband, thereupon, on the 23d day of January, 1869, brought his action against his wife and her two sons, the plaintiffs in error, charging that the land was subject to a lien for the purchase money so paid, and that the deed of gift to the sons was made secretly and fraudulently, and without his knowledge or consent, for the purpose of defrauding him of his marital rights, and praying that the deed might be set aside as fraudulent, and the land so conveyed be subjected to the payment of the purchase money so collected of him.

To the plaintiff's petition in this action, a demurrer filed by the de-

defendants was overruled by the court. The defendants then answered, denying that there was any lien upon the land for said purchase money, and denying the charge of fraud, alleging that the conveyance to the sons was made with the knowledge and consent of the husband.

The case was heard by the court upon this issue, and resulted in a finding by the court in favor of the plaintiff, and a decree for the sale of the land, in case the defendants should fail to refund the money so paid. A motion for a new trial on the ground, among other things, that the finding of the court was contrary to the law and the evidence, was overruled by the court, and the defendants took a bill of exceptions embodying all the evidence in the case.

The action was pending prior to the passage of the Act of April 18, 1870 (67 Ohio L. 113), relating to the testimony of husband and wife, and was tried after the taking effect of that act; and the bill of exceptions shows that on the trial of the case the plaintiff was examined in his own behalf as a witness, the defendants objecting to him as incompetent, and that he testified, among other things, to certain communications between himself and wife, and certain acts done by them in each other's presence; but whether these acts or communications were in the known presence of any other person or persons does not appear.

The bill of exceptions also shows that after the plaintiff had been examined, the defendants moved the court to exclude his entire testimony, but without discriminating as to any particular part or parts thereof, and that no special objection was made to that part of the testimony relating to the communications or acts aforesaid of the husband and wife.

From the record it also appears that the wife is possessed of some personal property in her own right, but the amount thereof, and whether it is exempt from execution, does not appear.

The grounds on which the plaintiffs in error seek to reverse the judgment are sufficiently stated in the opinion of the court.

*William Craighead*, for plaintiffs in error. I. Does the petition contain such allegations as will entitle the plaintiff not alone to a decree annulling the deed, but further, to a recovery against his wife, and an order on the defendants to refund the money he has paid, or that an order issue to sell the land and refund him this amount out of the proceeds of the land?

It seems to me that in order to sustain this legal proposition two others must first be established, to wit:—

1. That a vendor's lien is assignable.
2. That a husband may assert it against his wife during the existence of the marriage.

I regard the first proposition as pretty well settled in Ohio, and cite the following authorities: *Jackman v. Halleck*, 1 Ohio, 318; *McArthur v. Porter*, 1 Ohio, 99; *Tiernan v. Beam*, 2 Ohio, 383; *Brush v. Adams*, 14 Ohio, 20; *Horton v. Horton*, 14 Ohio, 443; *Taylor v. Foot's Adm'rs*, Wright, 356; *Schnebley & Lewis v. Regan*, 7 Gill & Johns. 120; *White & Tudor's Eq. Cases* (3d ed.), 275, 368; *Ex parte Lauring*, 2 Rose's Cases, 791; 1 Ross on Leg. 634, 635.

If, then, as shown by the authorities above cited, the assignee of a promissory note for the payment of purchase money cannot assert

this lien, much less can Westerman, who voluntarily placed himself by marriage in a position where the law makes him liable for the debt, which has become his debt by judgment against him, and who has paid only a lien and incumbrance on his own land, assert this lien against his wife and her grantees, or against her alone, if the deed was set aside for fraud.

But, for the sake of argument, let us admit that Westerman is a creditor of his wife to the extent claimed, and could be substituted to the vendor's lien, or, in other words, suppose the vendor himself had not been paid, and had filed this petition against these defendants, would it entitle him to the relief he prays as against these grantees?

A bill in equity to enforce a vendor's lien, or to set aside conveyances as fraudulent against creditors, must show affirmatively that the complainant has exhausted his remedy at law against the personal estate, or must aver such facts as show that the complainant cannot have a full, complete, and adequate remedy at law. This bill discloses the fact that Mrs. Westerman has a large amount of *other valuable real and personal property*. If he can subject this property, he can any she has. 1 White & Tudor's L. C. in Eq. 274; *Pratt v. Van Wick*, 6 Gill & Johns. 495; *Hall v. McCubbin*, 6 Gill & Johns. 107; *Richardson v. Stillinger*, 12 Gill & Johns. 478; *Bottorf v. Connor*, 1 Black. 287; *Eyler v. Crubbs*, 2 Md. Ch. 303; *Nash Practice* (last ed.), 353, No. 6; *McArthur v. Porter*, 1 Ohio, 99; *Jackman v. Halleck*, 1 Ohio, 318; *Tiernan v. Beam*, 2 Ohio, 383; *Williams v. Roberts*, 5 Ohio, 35; 1 Hill Ch. 466; 13 Ohio St. 263.

But another view, and one which I regard as fatal to the right of this plaintiff to recover, is, by law the husband is liable for the debts of his wife contracted while sole. If merged in judgment against him during coverture, the debt becomes his debt. *Vanderhyden v. Mallory*, 1 Comst. 452; *Welden v. Welden*, 7 Ohio St. 30; *Palmer v. Wakefield*, 43 E. C. L. 227; *Burton v. Burton*, 5 Harrington, 441; *Tyler on Inf. & Cov.* 331, 339; 2 Jones Eq. 205; 4 Dessau. 370; *Warren v. Williams*, 10 Cush. 79; *Warren v. Williams*, 6 Gray, 559; 2 B. Mon. 99.

The changes made by our statutes regulating the relation of husband and wife do not enable the wife in our state to hold and dispose of her property independent of her husband, and were intended by the legislature not to enlarge her liabilities to her husband, but to protect her rights; not to create for her new rights, but simply to take away her husband's control over such as she had. *Smiley v. Smiley, Adm'r*, 18 Ohio St. 543.

The provision of the Act of 1870 does not apply to an action pending *between husband and wife*, but enables either to be called, in actions pending between either and any third party, to prove such communication so made, or act so done. To hold that this statute, which is enacted for the purpose of indicating who shall be *incompetent*, makes husband and wife competent for or against each other, would be in effect to declare that language which plainly expresses itself as referring to one subject really was intended to refer to another.

The court below held that the general rule of evidence is competency, and that the amendment of 1870 is a limitation of the rule. If this be true, I ask, where is the provision of law which changes the common law



rule as to competency of husband and wife and authorizes them to testify for or against each other, to which this is the exception or limitation? For then it is the rule which permits such evidence, not this clause, which is said to be the limitation of the rule. To make the clause operate as a limitation, the capacity to so appear as witnesses must exist independently of the limitation. If it be a limitation, what does it limit? Not certainly their capacity so to testify for or against each other, because they are not so competent independent of the clause. If they are thus competent, then it is not the clause which makes them so; and the question comes back, are they competent? They are not at common law, and they are not made so by any other statute, hence they are not competent at all. To hold otherwise, is equivalent to saying that a statute to make them incompetent in one particular case makes them competent in all.

The law of 1870 does not apply to this cause, as it was an action pending long prior to the passage of the amendment. Constitution, art. 1, sec. 238; Code, 602; *A. & G. W. R. R. v. Campbell*, 4 Ohio St. 583; *Calkins v. Ohio*, 14 Ohio St. 222; *Mitchell v. Eyster*, 7 Ohio, 257; *Hale v. Wetmore*, 4 Ohio St. 600; *Cochran v. Taylor*, 13 Ohio St. 387.

*Jordan & Linden*, for defendant in error. We think the purchase money paid by defendant in error was a charge or lien upon the land.

Henry and Elizabeth were married September 16, 1867, after the passage of the Act of March 23, 1866, which limits to the wife's separate use and control all her property, real and personal.

We understand the effect of this statute to be to limit to her separate use and control all her property as effectually as it was done at common law, when words to that effect were used in a conveyance or devise to her. *Bear v. Bear*, 33 Penn. St. 525; *Gliddin v. Taylor*, 16 Ohio St. 518, 1st clause.

When property was so limited to her at common law and no trustee was appointed, the husband became trustee for her. Tyler on Inf. & Cov. 441; Story's Eq. sec. 1380; Clancy on Women, 265 *et seq.*; 2 Bright on Husb. & Wife, 214.

And we understand this to reserve to her *all* of her property and effects, so that *none* of it passes to him.

The common law gave him all the money, personal property in possession, choses in action when collected, and the use of her real estate during her life, when not limited to her sole and separate use, and made him liable for the antenuptial debts. The statute of 1866 denies him all this property and effects. Whatever technical reason may have been assigned for this common law liability of the husband for the antenuptial debts of the wife, it undoubtedly was based on the corresponding benefit that accrued to him in getting her property and effects.

Our statute of 1866 (sec. 3) simply provides that the wife's property shall also be liable for any judgment rendered against her and her husband on an antenuptial debt.

The tendency of our statutes has been to treat the wife as a *feme sole* as to all her property rights and obligations.

Although our statute leaves the husband liable for the antenuptial debts of the wife while it denies to him her property, it does, in express

terms, make her property liable for the debt. In this case it was already liable. Roop had a vendor's lien on it. He could have executed his judgment against said land, or could have forced payment in equity from it. He was not bound to have forced his execution against the husband's property. Henry Westerman's obligation was only collateral. He was really only surety; he should be subrogated to Roop's claim.

Under the statute of 1866 the husband became her trustee to hold said property charged with Roop's debt, and he may now be reimbursed out of said property. *Hulme v. Tenant*, 1 Lead. Cas. in Eq., Hare & Hall Notes, 3d Am. ed. 501-545, especially 515, citing *Nelson v. Booth*, 5 Weekly Reporter, 722.

If we are right in this, then it seems there is no alternative but to set aside this fraudulent conveyance. Not on the ground that it restores him to his curtesy, but because this conveyance defrauds Henry Westerman of the rights Roop held to which he is subrogated. *Neilson & Churchill v. Fry*, 16 Ohio St. 552.

In support of the second proposition, we refer the court to the general doctrine of fraudulent conveyances to defeat substantial rights, which courts of equity always set aside.

WELCH, J. The questions raised by the assignments of error are substantially the following:—

1. Did the evidence warrant the court in its finding that this conveyance was fraudulent as against the husband, and that the purchase money paid by him was a charge or lien upon the land?

We need only say, as to this question, that we answer it in the affirmative.

2. Did the court err in admitting the husband to testify as a witness in the case? We think not. As we understand the provisions of law upon the subject, the Amendatory Act of April 18, 1870 (67 Ohio L. 113), which was in force at the time of the trial, merely makes husband and wife incompetent as to communications made by one to the other, and acts done by either in the presence of the other, and not in the known presence of a third person, and leaves them as to other matters competent witnesses. And the act being purely remedial in its character, applies as well to cases pending, and causes of action existing at the date of its taking effect, as to future cases and causes of action. To give it such an application is not to "affect" the pending "action" or "proceeding" within the meaning of the Act of February 19, 1866 (S. & S. 1), but merely to affect the manner of trying or conducting the action or proceeding. By the word "proceeding," in the last named act, is meant, not the steps taken or form of proceeding in an action, but a certain description of *suit* which is not properly denominated an action.

3. Did the court err in refusing to reject the testimony of the husband? It is claimed that, even admitting the husband to be a competent witness, the court should have ruled out that part of his testimony which related to communications and acts of the parties, because the bill of exceptions does not show that any third person was present at the time they were made or took place. It seems to us that there are two good answers to this objection: (1.) Evidence to show the presence of such third person was for the court, and not for the jury, and must be presumed till the

contrary is shown; and (2.) the motion was too broad, including all the husband's testimony, without discriminating, or making known to the court the ground on which the testimony was sought to be excluded.

4. Did the court err in the judgment or decree which it rendered — was the plaintiff, upon the fact stated in his petition and found by the court, entitled in equity to set the conveyance aside, and charge the money paid by him upon the land? The answer to this question depends entirely upon the construction of our late statutes upon the subject of marital rights. At common law, the husband was liable during coverture for the debts of his wife contracted before marriage, and damages occasioned by her torts. This was an obligation which rested upon him, not only as between himself and her creditors, or parties injured by her, but also as between himself and his wife. The reason of this obligation was said to be the fact that by the marriage he became the owner of her entire personal estate. By our late statutes, this reason or consideration has been completely taken away. As between the husband and creditors of the wife, perhaps, the obligation of the husband still exists as at common law. But the question is whether it still subsists, and whether it has been modified, and how far modified, as between the husband and wife.

By sections 1 and 2 of the Act of April 2, 1861, as amended March 25, 1866 (S. & S. 389-391), all the real and personal property of the wife at marriage remains her separate estate. By section 3 it is declared, that "in any action against the husband and wife upon any cause existing against her at their marriage, or upon any tort committed by her during coverture, or upon any contract made by her concerning her separate property, . . . the separate property of the wife shall be *also* liable to be taken for any judgment rendered therein."

By this statute, was it the intention of the legislature to make the husband's and wife's property, as between themselves, equally liable, and to leave it entirely to the whim or caprice of the creditor upon which he would seek satisfaction? If so, it seems to be the only case where a like legislative intent has been manifested, and seems, moreover, to be manifestly unjust. True, such is the law where a judgment is recovered against joint trespassers; but the reason of the rule there by no means applies to judgments founded on contract — the rule in the case of torts having been established merely as a mode of punishment, or by way of disfavor to wrongdoers. The legislature must have intended that one or the other of the parties, in a case like the present, should be *primarily* liable as between themselves, and every consideration of justice and fair dealing points to the wife as that party. If the statute will bear this construction, and we think it will, equity requires that it should be so interpreted. It will be observed that one of the three cases specified, in which the wife's property is declared to be "*also* liable" for the judgment, is a case where the husband was not liable at common law, and I presume is not made liable by the statute. I refer to the case of a judgment on the wife's contract concerning her separate property. By the word "*also*," in the phrase "*also* liable," in the third section of the act, we do not understand that any *liability of the husband*, or of his property, is implied. No such liability had been declared in the preceding part of the statute. But we understand this word "*also*," in the third section, as referring to

the *ownership of the wife*, declared in the preceding sections. The legislature intended to say, not that *the husband should be liable*, and the property of the wife should be "also liable," but that the property of the wife should be *separately owned by her*, and should be "also liable" for the judgments recovered in the three cases named.

If this is the true interpretation of the statute, it follows that the court below rendered the right judgment in the case. By the payment of this debt the husband became the creditor of his wife, as well as entitled to be subrogated to the rights of her brother, and to enforce the lien which the latter held against the land; and in either character, he was entitled to set aside the fraudulent and voluntary conveyance, and subject the land to the payment of the debt.

But the record shows that the wife had other property, and it is claimed that this should have been exhausted before going upon the land so fraudulently conveyed. We know of no such rule in equity. As to creditors, a fraudulent sale of land is absolutely void. The creditor may levy his judgment upon the land, and cause it to be sold for the satisfaction of his judgment, and the fraudulent sale will be held a nullity, irrespective of the other property of the debtor. Besides, there is nothing here to show the amount of the wife's other property, or whether it is liable to be taken or subjected to the payment of the debt.

There are other questions raised and argued by counsel in the case, but the view thus taken of it renders their consideration unnecessary.

*Judgment affirmed.*

MOLLVAIN, C. J., WHITE, REX, and GILMORE, JJ., concurred.

## COURT OF APPEALS OF VIRGINIA.

(To appear in 26 Grattan.)

OF THE POWER OF A STATE TO TAX FOREIGN CORPORATIONS. — WHEN CORPORATION IS TO BE REGARDED AS AN AGENT OF THE GOVERNMENT OF THE UNITED STATES. — TAXATION OF PROPERTY OF CORPORATION.

### WESTERN UNION TELEGRAPH CO. v. CITY OF RICHMOND.

1. The council of the city of Richmond has authority, under the charter of the city, to impose a license tax upon a foreign telegraph company having an agency in the city and doing business therein. And there is nothing in the constitutions and laws of the state or of the United States which forbids such a tax, if it is equal and just in its provisions.
2. Though the ordinance of the city imposing taxes speaks only of persons or firms doing business in the city, yet it imposes a tax in terms on telegraph companies, and obviously intends to include incorporated companies as well as individuals.
3. Corporations are to be deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute.

4. Corporations which derive their existence and exercise their franchises under authority of state laws, but are employed by the national government for certain duties and services, may be exempted by Congress from any state taxation which will really prevent or impede such services; but in the absence of legislation by Congress to indicate that exemption, if deemed essential to the performance of governmental services, it cannot be claimed on the mere ground that the corporation is employed as an agency of the government. And the tax may be either upon the property or business of the corporation.
5. The cases recognize a distinction between taxation of the property belonging to a private corporation employed by the government, and taxation of the instrumentalities or means of the government in the possession of such corporations. The state may tax a banking institution; but it cannot tax the currency or the government's bonds belonging to such bank. It may tax the railroad, but not the mail or the munitions or other property of the government. It may tax the contractor with the government, though not the contract.

THIS was an action of assumpsit in the circuit court of the city of Richmond, brought in May, 1873, by the Western Union Telegraph Company against the city of Richmond, to recover the sum of one hundred and twenty-five dollars, the amount of a license tax which the company had been compelled to pay to the city of Richmond. The only questions in the cause were, whether the company could be subjected to pay a license tax to the city under the laws and constitutions of the state of Virginia and of the United States, and whether corporations were included in the terms of the city ordinance.

The Western Union Telegraph Company is a corporation chartered by the legislature of the State of New York, and has an office and transacts business in the city of Richmond. The ordinance of the city classified telegraph companies, and this company was placed in the third class, and the tax on the companies in this class was fixed by the ordinance at one hundred and twenty-five dollars. This tax the agent of the company refused to pay, until the property of the company was levied on by the officer, when he paid it under protest. The case was submitted to the decision of the judge without a jury, and he rendered a judgment in favor of the city. And thereupon the company applied to this court for a writ of error; which was awarded. The laws and ordinances, as well as the facts, are sufficiently stated in the opinion of Staples, J.

*F. L. Smith*, for the appellant. 1. There is no mode provided in the ordinance whereby the proper classification of *chartered companies* could be ascertained; and the placing said telegraph company in the third class for taxation, and subjecting said company to a tax of \$125, was wholly unauthorized by the said ordinance or any law whatsoever, state or municipal.

There is no law which authorizes the city of Richmond, by its ordinance, to declare that the word "*person*" or "*firm*" should embrace bodies politic or corporate.

2. That the statute of the State of Virginia in relation to commissioners and collectors of the public revenue for the year 1872 provides that but *one license* shall be required of a telegraph company; and that, upon the issuing of which license, messages and communications may be transmitted through any county or corporation in the state.

That the city of Richmond, a municipal corporation deriving its powers from the legislature, has no power, in violation of this exclusive grant, to

the *ownership of the wife*, declared in the preceding sections. The legislature intended to say, not that *the husband should be liable*, and the property of the wife should be "also liable," but that the property of the wife should be *separately owned by her*, and should be "also liable" for the judgments recovered in the three cases named.

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1. The council of the city of Richmond has authority, under the charter of the city, to impose a license tax upon a foreign telegraph company having an agency in the city and doing business therein. And there is nothing in the constitutions and laws of the state or of the United States which forbids such a tax, if it is equal and just in its provisions.
2. Though the ordinance of the city imposing taxes speaks only of persons or firms doing business in the city, yet it imposes a tax in terms on telegraph companies, and obviously intends to include incorporated companies as well as individuals.
3. Corporations are to be deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute.

4. Corporations which derive their existence and exercise their franchises under authority of state laws, but are employed by the national government for certain duties and services, may be exempted by Congress from any state taxation which will really prevent or impede such services; but in the absence of legislation by Congress to indicate that exemption, if deemed essential to the performance of governmental services, it cannot be claimed on the mere ground that the corporation is employed as an agency of the government. And the tax may be either upon the property or business of the corporation.
5. The cases recognize a distinction between taxation of the property belonging to a private corporation employed by the government, and taxation of the instrumentalities or means of the government in the possession of such corporations. The state may tax a banking institution; but it cannot tax the currency or the government's bonds belonging to such bank. It may tax the railroad, but not the mail or the munitions or other property of the government. It may tax the contractor with the government, though not the contract.

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The Western Union Telegraph Company is a corporation chartered by the legislature of the State of New York, and has an office and transacts business in the city of Richmond. The ordinance of the city classified telegraph companies, and this company was placed in the third class, and the tax on the companies in this class was fixed by the ordinance at one hundred and twenty-five dollars. This tax the agent of the company refused to pay, until the property of the company was levied on by the officer, when he paid it under protest. The case was submitted to the decision of the judge without a jury, and he rendered a judgment in favor of the city. And thereupon the company applied to this court for a writ of error; which was awarded. The laws and ordinances, as well as the facts, are sufficiently stated in the opinion of Staples, J.

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There is no law which authorizes the city of Richmond, by its ordinance, to declare that the word "*person*" or "*firm*" should embrace bodies politic or corporate.

2. That the statute of the State of Virginia in relation to commissioners and collectors of the public revenue for the year 1872 provides that but *one license* shall be required of a telegraph company; and that, upon the issuing of which license, messages and communications may be transmitted through any county or corporation in the state.

That the city of Richmond, a municipal corporation deriving its powers from the legislature, has no power, in violation of this exclusive grant, to

require another license and superadd another tax upon the business of the said telegraph company.

3. That the action of the corporate authorities of the city of Richmond, in requiring a license from the Western Union Telegraph Company, and imposing a tax thereon, is in violation of the third clause of section eight of article one of the Constitution of the United States, which gives to Congress the power to regulate commerce among the several states.

The agreed facts, stated in the record, show that the messages sent by this company often pass through many states; and, beyond all doubt, such communications constitute, within the meaning of the Constitution, commerce or *intercourse*.

In *Gibbons v. Ogden*, 9 Wheat. 189, Chief Justice Marshall said: "Commerce undoubtedly is traffic; but it is something more, it is *intercourse*. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

So in *Corfield v. Coryell*, 4 Wash. C. C. R. 371, 379, Judge Washington says: "Commerce with foreign nations and among the several states can mean nothing more than intercourse with those nations and among those states for the purpose of trade, be the object of trade what it may; and thus intercourse must include all the means by which it can be carried on, whether by free navigation of the waters of the several states, or by a passage overland through the states, where such passage becomes necessary to the commercial intercourse between the states."

In *State of Pennsylvania v. The Wheeling & Belmont Bridge Company*, 18 How. 431, Nelson, J., said: "The regulation of commerce includes *intercourse* and navigation."

In *Crandall v. State of Nevada*, 6 Wall. 35, the supreme court of the United States unanimously declared a statute of Nevada unconstitutional which imposed a tax on every passenger leaving the state.

So in *Minot v. The Phila., Wilm. & Balt. R. R. Co.* 2 Abbott's U. S. R. 324, it is decided that a tax imposed under a statute of the State of Delaware on the use of locomotives and cars on railroads in that state was unconstitutional, so far as it applied to locomotives and cars used in commerce between the states. That the transportation of persons or property through a state is beyond its power of taxation, under the commercial clause of the Constitution of the United States.

In the case of *The Western Union Telegraph Co. v. The Atlantic & Pacific States Telegraph Co.* 5 Nevada, 102, the act of Congress, approved July 24th, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," came under review before the supreme court of Nevada. The question was directly raised, whether telegraph communication between the states was a part of commercial intercourse within the jurisdiction of Congress, under the commercial clause of the Constitution of the United States; and the court held that it is. They say: "Is telegraphy any branch of commercial intercourse? To ask the question is to answer it. So interwoven has the custom of communication by telegraph become with trade and traffic, that to separate it, without serious disturbance of vast trade relations and financial trans-



actions, would be a task as difficult as to cut the pound of flesh without a drop of blood. It is the life and soul of civilized commercial transactions: many of the most important are daily ruled by telegraph. The banker, the merchant, the farmer, the broker, all traders, depend upon the telegraph for speedy information and means of intercourse in their various business and traffic. If the ship that carries the cargo comes within the constitutional power of Congress to regulate commerce, as it confessedly does, as a means of commercial intercourse, certainly the instrumentality through which is directed the lading, sailing, and unlading of the ship, the purchase and sale of the cargo, and all the minutiae of the venture and the voyage, is equally a means, only of a higher and more advanced grade."

The decisions of the supreme court of the United States, which review the power of Congress on this subject, are fully examined by the court in that case.

We beg leave also to refer to the cases of *Brown v. The State of Maryland*, 12 Wheat. 419, 429, and *The Passenger Cases*, 7 How. 283.

In the case of *The Phila. & Reading R. R. Co. v. The Commonwealth of Penn.*, recently decided by the supreme court of the United States, and not yet reported, the power of Congress to regulate commerce among the several states is fully considered. The court held that a tax imposed under an act of the Legislature of the State of Pennsylvania of August 25, 1864, on articles carried through the state, or articles taken up in the state and carried out of it, or articles taken up without the state and brought into it, is unconstitutional and void.

Waves of electricity are quite as fully subjects of exclusive dominion and property as any other external thing.

The wire of a telegraph line is nothing but a way, a means of passage; and the thing passing is not the less property because it is one of the imponderable elements.

"There is no distinction in principle between electric fluid conveyed through a parish, and water conveyed through a parish." Alderson, J., *Electric Tel. Co. v. Overseers of Poor of Salford*, 24 L. J. Ex. 151, 152, New Series, p. 324. It has repeatedly been ruled by the supreme court of the United States that no state can tax either persons or property passing through it. It is an interference with inter-state communication and intercourse, which is declared illegal. If this be true, then by what authority can the State of Virginia, and still less a municipal corporation created by its legislature, lay a tax on a license for sending telegraphic messages through the state, or out of the state into other states?

The power of taxation condemned in the Pennsylvania case above cited does not, in principle, differ from that exercised by the city of Richmond in imposing a license tax on the Western Union Telegraph Company. If Virginia can tax a telegraphic communication passing through it from other states, however distant, why may not such other states do the same thing, and thereby break down the whole system of telegraphic communication by onerous taxation.

By the statement of facts set out in the record, the Western Union Telegraph Company is one of the important agencies of the federal

government in the management and conduct of its various departments and national affairs; and, as such, no state or municipal corporation has a right to impose a license tax upon it, whereby the operations of the government may, at least to the extent of the usefulness of this instrumentality, be obstructed and impaired. We would refer on this question to the following authorities: *Cooley Const. Lim.* ch. xiv. pp. 480, 481, 482; *McCulloch v. Maryland*, 4 Wheat. 316, in which the court held that the law of Maryland imposing a tax on the Bank of the United States was unconstitutional. In the unanimous opinion delivered by Chief Justice Marshall, he says: "The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared." *Weston v. Charleston*, 2 Peters, 449, in which the court (Judge Marshall again delivering the opinion) say that a tax on stock of the United States, held by an individual citizen of a state, is a tax on the power to borrow money on the credit of the United States, and cannot be levied by or under the authority of a state consistently with the Constitution. *Bank Tax Case*, 2 Wall. 200. A tax laid by a state on banks, "on a valuation equal to the amount of their capital stock paid in, or secured to be paid in," is a tax on the property of the institution; and when that property consists of stocks of the federal government, the law laying the tax is void. *Bank of Commerce v. New York City*, 2 Black, 620; *The Banks v. The Mayor*, 7 Wall. 16; *Bank v. Supervisors*, *Ib.* 26; *Brown v. Maryland*, 12 Wheat. 419; *Osborn v. Bank United States*, 9 Wheat. 738-859; *Dobbins v. Commissioners Erie County*, 16 Peters, 435.

The learned counsel for the appellee refers to the case of *Railroad Co. v. Peniston*, 18 Wall. 5. In that case most of the authorities bearing on this question are cited, and the distinction is there broadly drawn between a tax on *property* and a tax on the *business and operations* of a corporation — the former being held liable to taxation, but the latter *not so liable*. I ask the special attention of the court to that case. At page 35, the court expressly decide that a tax on the operations of an instrument employed by the general government to carry its powers into execution is unconstitutional. The court say (page 36): "This distinction, so clearly drawn in the earlier decisions, between a tax on the property of a government agent and a tax on the action of such agent, or upon his right to be, has ever since been recognized;" and such continues the distinction to the present time.

*J. R. V. Daniel & L. Page*, for the appellee. The appellant objects that the tax complained of was unauthorized by any law whatsoever, state or municipal; that the city of Richmond, acting under delegated authority, exceeded their authority in the imposition of this tax; that by the use of the words "person" or "firm" the ordinance did not include a body corporate, such as the Western Union Telegraph Company; and that the statute of the State of Virginia by implication forbids taxation on the part of the city.

The Legislature of Virginia, by its act providing a charter for the city

of Richmond (Sess. Acts 1869-70, p. 138, § 70), expressly grants to the municipal authority power to "grant or refuse licenses," and to "require taxes to be paid on such licenses to agents of insurance companies (and several other specified employments), to commission merchants, and all other business which cannot be reached by the ad valorem system under the preceding section." The preceding section provides for taxation of property by assessment. We submit that the business of the Western Union Telegraph Company comes fairly under the head last mentioned.

"A corporation is a political person, capable, like a natural person, of enjoying a variety of franchises." 1 Kyd, 15. "The construction is that when 'persons' are mentioned in a statute, corporations are included, if they fall within the reason and design of the statute." Angel & Ames on Corporations, p. 3, § 6. "A corporation has been held to be included in the term 'individual' in a tax law." *Otis, &c. v. Ware*, 8 Gray, 509. In an important Virginia case it is settled that when the word "person" is used in a statute, corporations, as well as natural persons, are included for civil purposes. *Baltimore & Ohio R. R. Co. v. Gallahue's Adm'rs*, 12 Gratt. 655. It will hardly be questioned that corporations "fall within the reason and design" of the ordinance, when it is observed that the section containing the words objected to, namely, "person and firm," refers by the number of the section to "express companies and telegraph companies."

In regard to the assertion that the right of the city of Richmond to tax the Telegraph Company is taken away by the statute for the assessment of taxes, licenses, &c., for the year 1872 (Sess. Acts 1871-72, p. 194, § 143), the appellee contends that the words of the statute refer only to the commonwealth's revenue, and that, in securing this to herself, she does not intend to deprive the city of Richmond of its reasonable income. There are no words to inhibit the city from the exercise of its chartered right. The words, "one license for the same company shall be sufficient," are explained by the remainder of the clause, "and this section shall not be construed to require a license for each office of the same company." It merely declares that the company, as a whole, and not each office for itself, shall obtain from the state authority a license, subject to the conditions prescribed. Taking this whole section together, and applying to it the just rules of interpretation, its true intent and meaning will be seen to be that the incorporated company, having complied with the statutory regulations, is discharged from further requirements and demands on the part of the state. *Ould & Carrington v. City of Richmond*, 23 Gratt. 464; *S. C. 1 Am. L. T. R.* 241; *Gilkeson v. Frederick Justices*, 13 Ib. 577; *Orange & Alex. R. R. Co. v. Alexandria*, 17 Ib. 176.

The appellant further objects that the tax imposed by the city is unconstitutional, because it violates that clause of the Constitution of the United States which gives to Congress the power to regulate commerce among the several states. It is asserted that telegraphic messages are a most important element of commercial intercourse between the states, of which Congress has exclusive control. This objection is well answered by the supreme court in its decision of the case of *Paul v. Virginia*, 8 Wall. 168.

In that case the State of Virginia required of a foreign insurance com-

pany, not only to pay a license tax, but to make a large deposit of bonds, as a condition precedent to carrying on its business within its territory: these requirements, it was contended, were unconstitutional, because the issuance of policies of insurance was a commercial transaction, the parties being domiciled in different states, and that the legislation in question was a regulation of commerce. But the court held otherwise; and in replying to the argument in support of the appellant's view, it was said, that such "policies are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another and then put up for sale."

There is much else in the opinion delivered in that case deserving of attention here, but we content ourselves with the brief citation we have made.

The appellee respectfully insists that the communications transmitted across the electric wires are no more articles of commerce, in the view taken above, than are contracts of insurance made by companies chartered in one state with citizens of another. "In *Nathan v. Louisiana*, 8 How. 73, the court held that a law of that state imposing a tax on money and exchange brokers, who dealt entirely in the purchase and sale of foreign bills of exchange, was not in conflict with the constitutional power of Congress to regulate commerce. The individual thus using his money and credit, said the court, 'is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the ship-builder, without whose labor foreign commerce could not be carried on.' And the opinion shows that although instruments of commerce, they are the subjects of state regulation, and, inferentially, that they may be subjects of direct state taxation."

Instruments of commerce, then, are the subjects of state taxation. It will hardly be claimed that the electric telegraph is more than an *instrument* of commerce. *Coolley v. Board of Wardens of Port of Philadelphia*, 12 How. 299, 319; *License Cases*, 5 Ib. 504, and therein opinion of Taney, C. J. (explaining *Gibbons v. Ogden*), p. 581; *Wilson v. Blackbird Creek Marsh Co.* 2 Peters, 245, 251. In the license cases it was decided that the grant of a general authority to regulate commerce is not, therefore, a prohibition to the states to make any regulations concerning it within their own territorial limits, not in conflict with an act of Congress. A state statute on this subject is valid, unless in opposition to an act of Congress repugnant to it, passed in the exercise of the power to regulate commerce. "The act (of the state) is not in violation of this power in its dormant state." 2 Peters, 252.

In the *Passenger Cases*, 7 How. 288, cited by the appellants, Justice McLean, in delivering the opinion of the court, adverse to the authority of the state in that case, uses these words: "A state cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce, the same as other property owned by citizens. A state may tax the stages in which the mail is transported; but this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce. And yet, in both in-

stances, the tax on the property in some degree affects its use." From the decision of the court, dissent Taney, C. J., and Justices Daniel and Woodbury. See opinion of Chief Justice, pp. 470 and 480.

The case of *Brown v. Maryland* was a direct tax on imports. *Vide* p. 448 of 12 Wheaton. And see *Woodruff v. Parham*, 8 Wall. 123, and opinion of court concerning *Brown v. Maryland*.

*Osborn v. Mobile*, 16 Wall. 479. In this case the question was whether an ordinance, in requiring payment for a license to transact in Mobile a business extending beyond the limits of the State of Alabama, was repugnant to the provision of the Constitution, vesting in Congress the power "to regulate commerce between the several states."

Osborn, agent of an express company chartered by the State of Georgia, was fined for conducting his business without a license in Mobile. The chief justice, delivering the opinion of the court, decided that the ordinance was constitutional. The whole of his brief and forcible opinion bears upon the present case.

A statute of Maryland required all traders resident within the state to take out licenses and to pay therefor certain sums from \$12 to \$150, according to a certain scale. The statute also required from all persons who were not permanent residents of the state, offering for sale any goods or merchandise not manufactured in Maryland, an annual license, for which \$300 was to be paid. *Held* (*Ward v. Maryland*, 12 Wall. 418), that the statute imposed a *discriminating* tax upon *non-resident traders*, and that it was *pro tanto* repugnant to the federal Constitution and void. Mr. Justice Clifford, giving the unanimous opinion of the court, says: "Possessing, as the states do, the power to tax for the support of their own governments, it follows that they may enact reasonable regulations to provide for the collection of taxes levied for that purpose, not inconsistent with the power of Congress to regulate commerce, nor repugnant to the laws passed by Congress upon the same subject. Reasonable regulations for the collection of such taxes may be passed by the states, whether the property taxed belongs to residents or non-residents; and in the absence of any congressional legislation on the same subject, no doubt is entertained that such regulations, if not in any way discriminating against the citizens of other states, may be upheld as valid."

The appellant further alleges that the Western Union Telegraph Company is one of the important agencies of the federal government, and, as such, that no state or municipal corporation has a right to impose a tax upon it, whereby it is said the operations of the government may be obstructed or impaired. On this point they refer to *Cooley on Const. Limitations*, and *McCulloch v. Maryland*, 4 Wheat. 816. The discussion in the former work is based upon the latter case. It was there decided that the State of Maryland could not tax the Bank of the United States, a *creation* of the federal government, and its particular agent and servant, such as the mail, the mint, patent rights, and other similar federal creations, which the chief justice enumerates as belonging to the same class. "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress, to carry into execution powers conferred on that body by the people of the United States?"

We think it demonstrable that it does not." The rest of his opinion clearly shows that, by "those means employed by Congress," the chief justice refers to the governmental creations to which we have alluded. In the *Bank Tax Case*, 2 Wall. 200, the capital consisted of stocks of the federal government, and the decision in *McCulloch v. Maryland* applied.

These views are further maintained in the case of *National Bank v. Commonwealth*, 9 Wall. 353, and especially to the opinion of the court, pp. 361-2. Directly to the point is the case of *Thomson v. Pacific Railroad*, 9 Wall. 579. In this latter case, the chief justice, in the opinion of the court, says: "We are not aware of any case in which the real estate, or other property of a corporation not organized under an act of Congress, has been held to be exempt in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government. It is true that some of the reasoning in the case of *McCulloch v. Maryland* seems to favor the broader doctrine. But the decision itself is limited to the case of the bank, as a corporation created by a law of the United States, and responsible, in the use of its franchises, to the government of the United States." "We do not think ourselves warranted therefore in extending the exemption established by the case of *McCulloch v. Maryland* beyond its terms. We cannot apply it to the case of a corporation deriving its existence from state law, exercising its franchise under state law, and holding its property within state jurisdiction and under state protection."

In *Railroad Co. v. Peniston*, 18 Wall. 5, a question arose whether a railroad company chartered and aided by Congress, — partly controlled by the government and subject to its future regulations, the charter of the company conditioned that if the terms are not complied with, or the loans not paid, the road shall come under the control and management of Congress, and subject moreover to the use of the government at all times for transmission of mails, dispatches, troops, stores, &c., — was subject to state taxation. It was decided to be so subject.

"There are," says the court in its opinion, "we admit, certain subjects of taxation which are withdrawn from the power of the states, not by any direct or express provision of the federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the national government is legitimately exercised within the states. While it is true that government cannot exercise its power of taxation so as to destroy the state governments, or embarrass their lawful action, it is equally true that the states may not levy taxes, the direct effect of which shall be to hinder the exercise of any powers which belong to the national government. The Constitution contemplates that none of those powers may be restrained by state legislation. But it is often a difficult question, whether a tax imposed by a state does, in fact, invade the domain of the general government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a state tax, which remotely affects the efficient exercise of a federal power, is for that reason alone inhibited by the Constitution. To hold that, would be

to deny to the states all power to tax persons or property. Every tax levied by a state withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. The states are, and they ever must be, coexistent with the national government. Neither may destroy the other. Hence the federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise." He then considers the case of *Thomson v. Pacific Railroad*. "It may therefore be considered as settled, that no constitutional implications prohibit a state tax upon the property of an agent of the government, merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the states in the collection of their necessary revenue, without any corresponding advantage to the United States. A very large proportion of the property within the states is employed in execution of the powers of government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. *Telegraph lines are employed in the national service.* So are steamboats, horses, stage-coaches, foundries, ship yards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the states, it is manifest that the state governments would be paralyzed." He then refers to the cases relied on by the complainants in the case before him, and by the appellants in the present case, viz., *McCulloch v. Maryland* and *Osborn v. Bank of U. S.* In the former of these cases the tax "was not upon any property of the bank, but upon one of its operations; in fact, upon its right to exist as created. It was a direct impediment in the way of a governmental operation performed through the bank as an agent." "In *Osborn v. The Bank*, the tax held unconstitutional was a tax upon the existence of the bank, upon its right to transact business within the state of Ohio. It was, as it was intended to be, a direct impediment in the way of those acts which Congress for national purposes had authorized the bank to perform."

This last decision of the supreme court, to our apprehension, is absolutely conclusive of all controversy upon the questions raised in the case at bar.

If a private corporation, created by the laws of another state, for individual gain, unable to come into our midst and carry on its business, except by permission of the laws of Virginia, is not subject to the taxing power of the commonwealth and its governmental agencies, because, forsooth, this corporation is a contractor with the federal government, it would be difficult to say what persons or property are legitimate subjects of taxation. This monstrous proposition is, as we have seen, unsupported by authority, and is plainly repugnant to reason and justice. If maintained, it consummates the overthrow of all that is left of state government.

STAPLES, J., delivered the opinion of the court.

The charter of the city of Richmond authorizes the city council to raise annually, by taxes and assessments, such sums of money as they shall deem necessary to defray the expenses of the same, and in such manner as they shall deem expedient, in accordance with the laws of the state and of the United States.

In the execution of the powers thus confided to them, the city council may grant licenses or refuse them. They may require taxes to be paid on such licenses to agents of insurance companies, and all business which cannot be reached by the *ad valorem* system. Acts of 1869-70, page 138, sects. 69 and 70. In the case of *Ould & Carrington v. City of Richmond*, 23 Gratt. 464 (*S. C.* 1 Am. L. T. R. 241), this court construed these provisions as conferring upon the city council the general power of taxation, except only as it may be limited by the laws of the state or of the United States, and including all persons and subjects of taxation. It was also further held, that the mode of assessment adopted by the city council with reference to attorneys at law was sustained by the charter and by the Constitution.

The plan adopted by the city council in assessing telegraph companies is substantially the same as that pursued with reference to attorneys at law. They are divided into four classes, and required to pay a license tax graduated by the character of the business done by the company. The plaintiffs are placed in the third class, and are subjected to a license tax of one hundred and twenty-five dollars. The authority of the city council in the premises, and the validity of the assessment, must therefore be considered as adjudicated and settled by the decision of this court. It is said, however, that the ordinance of the city only applies to "persons or firms" and not to chartered companies. It is very true that the twelfth section speaks of "persons or firms" only, but the eighth section expressly mentions "telegraph companies;" and it is very clear it was the intention to include all telegraph companies, whether incorporated or not. The sections construed together plainly show that, in using the words "persons or firms" in the city ordinance, the council designed to embrace chartered companies as well as individuals. And this is sanctioned by practice and the decisions of the courts. In *Baltimore & Ohio R. R. Co. v. Gallahue's Adm'r*, 12 Gratt. 655, 663, Judge Allen said: "Corporations are to be deemed and taken as persons, when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute." . . . .

Another ground taken by the plaintiffs is, that the Act of March 15, 1872, provides that but one license shall be required of a telegraph company, upon the issuing of which the company's messages may be transmitted through any county or corporation of the state; and that the city of Richmond has no power, in violation of this exclusive grant, to require another license and impose another tax upon the business of the company.

It is very clear, however, that the Act of March 15, 1872, refers only to state taxation and revenue. The object of that act was, no doubt, to relieve telegraph companies from the payment of a tax for each office and place of business, and to authorize the transmission of messages throughout the state under one license, and upon the payment of a single tax.



It was not intended to interfere with municipal corporations in the exercise of powers of taxation conferred by their charters, or to strip them of valuable revenues derived from companies and individuals carrying on business within the corporate limits, and under the protection of the corporate government. This subject was fully considered in the case of *Humphreys, &c. v. Norfolk City*, decided by this court at the spring term 1874; and to that case reference is made. 25 Gratt. 97.

For these reasons the tax in this case must be held to be valid, so far as the Constitution and laws of the state are involved.

The only question remaining for consideration is, whether the tax is in violation of any provision of the Constitution of the United States, or of any rights and privileges conferred upon plaintiffs by act of Congress.

It is insisted that the action of the city council in requiring the license is repugnant to that clause of the Constitution of the United States, which gives to Congress the power to regulate commerce among the states.

The argument of the learned counsel upon this point briefly stated is, that commerce is not merely traffic; it is something more, it is intercourse; and intercourse includes all the means by which commerce is carried on among the several states: that telegraph communication is an important branch of commercial intercourse; and if Virginia may impose a tax upon those companies, so may every other state penetrated by their lines; and thus the whole system of telegraph communication may be destroyed by oppressive burdens in the form of taxation.

This proposition applies as well to states as to municipalities; and if the power of taxation is denied in one case it is in the other. The question is therefore a grave one, as well by reason of the principle as the amount involved.

The power of taxation, as universally conceded, is inherent in every sovereignty, and no constitutional government can exist without it. It extends to every person, to every trade and occupation, and every species of property. It is as essential to the states as to the federal government. If it is important that the agencies of the federal government shall be excepted from the taxing power of the states, it is equally necessary that those of the latter shall be maintained in undiminished force and vigor. In *Osborne v. Mobile*, 16 Wall. 479, 481, Chief Justice Chase said: "It is as important to leave the rightful powers of taxation unimpaired in the states, as to maintain the powers of the federal government in their integrity." The difficulty of drawing the line between the commercial power of the Union, and the taxing power of the states, is universally conceded. Clearly no law of the states, much less the exercise of this taxing power, ought to be declared invalid upon any mere speculative, indirect, and contingent ground. The repugnancy to the Constitution of the United States ought to be immediate, direct, and beyond all question.

If we assume that commerce means intercourse, as it clearly does, and that intercourse includes all the instrumentalities by which commerce is carried on between the states, there is scarce an avocation in the state engaged in foreign trade and traffic which may not be brought within the influence of the constitutional inhibition. It will be conceded that a state may tax a ship of one of its citizens engaged in the transportation of foreign merchandise, or passengers to and from the state; although it

cannot tax the passengers or the merchandise. The reason is, that the ship is not commerce, but a mere instrument of commerce. *Hays v. The Pacific Mail Steamship Co.* 17 How. 596.

And so it has been held, that a license tax upon persons engaged in buying and selling foreign bills of exchange is not repugnant to the Constitution of the United States. *Nathan v. Louisiana*, 8 How. 79. Such persons are not engaged in commerce, but simply in supplying an instrument of commerce. The court say: "They are less connected with it than the ship-builder, without whose labor foreign commerce cannot be carried on; and yet the business of ship-building may be taxed as the exercise of any other mechanical art. No one can claim an exemption from a general tax on his business within the state on the ground that the products sold may be used in commerce." In *Paul v. Virginia*, 8 Wall. 168, it was decided that the issuing of a policy of insurance is not a transaction of commerce within the meaning of the Constitution, though the parties be domiciled in different states. The court say these contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market, as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale.

The learned counsel for the plaintiffs cites the case of *Crandall v. Nevada*, 6 Wall. 85, in which the supreme court held a statute of Nevada unconstitutional which imposed a tax upon every passenger leaving the state. This, however, was not upon the ground that such a tax is "a regulation of commerce, or even repugnant to any express provision of the Constitution, but upon the broad principle that the federal government had the right to call to the capital of the Union any and all of its citizens to aid in the military or civil service of the country; and every citizen from the most remote states or territories is entitled to free access to all the great departments of the government, executive, legislative, and judicial; and this right cannot be made dependent upon the pleasure of a state over whose territory they must pass in the exercise of such right. And if the principle should be admitted at all, it might be carried to the extent of an entire prohibition." An attempt was made by the counsel, who argued the case, to show that the tax was upon the business of the carrier who transports the passengers, graduated by the amount of the business done. The court say, however, it was plainly a tax upon the passenger, and the officers and agents of the companies were mere collectors of the tax. It was this feature, and this alone, which rendered the tax inconsistent with the rights belonging to citizens of the different states and with the objects the Union was intended to attain.

The case of *State Freight Tax*, 15 Wall. 285, is much relied on by the counsel for the plaintiffs. There the supreme court held, that a statute imposing a tax upon freight taken up within the state and carried out of it, or taken up without and brought within the state, is repugnant to the clause of the Constitution giving to Congress the power to regulate commerce. The reason assigned is, that the tax was not upon the companies nor their franchises, property, or business, but upon the freight, or upon the consignor or consignee, and was so intended, and the company

required to pay a mere toll-gatherer. And inasmuch as the transportation of freight for the purpose of exchange or sale is a constituent of commerce, a tax upon freight is necessarily a regulation of commerce.

In the case of *State Tax on Railway Gross Receipts*, reported also in 15 Wall. 284, the supreme court sustains a Pennsylvania statute imposing a tax upon the gross receipts of railroad companies, although these receipts are made up in part of freights received for transportation of merchandise to and from the state into other states. This case is plainly distinguishable from the one last cited. In the first, as has been seen, the tax was upon transportation, and the railroad company a mere agency for its collection. In the second, the tax was upon the company, measured in amount by the extent of its business, or the degree to which its franchise was exercised. It was conceded that the ultimate effect of the tax would be to increase the cost of transportation, and therefore to affect commerce itself. Nevertheless, it was not a tax upon commerce any more than a tax upon a railroad or stage-coach is a tax upon transportation, or a tax upon attorneys constitutes a tax upon clients.

The court further say, in effect, it is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution. The states have authority to tax the estate, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property when belonging to natural persons. Such taxation may be laid on valuation or may be an excise; it may be a graduated contribution, proportioned to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise. Such a power is essential to the healthy exercise of the state governments; and the federal Constitution ought not to be so construed as to impair, much less to destroy, anything that is necessary to their efficient exercise.

These cases show the great difficulty encountered by the supreme court of the United States in dealing with this perplexing subject. They further show, I think, the anxiety of that court to preserve unimpaired the taxing powers of the states, so far as it can be done consistently with the paramount obligations of the federal Constitution. And although these decisions cannot perhaps be always harmonized, and the learned judges have been unanimous in but few of them, yet they certainly affirm the proposition that it is competent for a state to impose a tax upon individuals or corporations within its territory; and such tax, if it does not discriminate against non-residents or the products of other states, may be upon the property, or the franchises, or the business, of the individual or corporation; and its validity is not at all affected by the consideration that the party is engaged in foreign as well as domestic trade and traffic. *Society for Savings v. Coile*, 6 Wall. 594; *Woodruff v. Parham*, 8 Ib. 123; *Hinson v. Lott*, Ib. 148.

In *Hinson v. Lott*, 8 Wall. 148, the supreme court sustained a law of Alabama requiring every dealer in spirituous liquors introducing liquor into the state for sale to pay a tax per gallon before offering the same for sale within the limits of the state. Mr. Justice Miller, in delivering the opinion of the court, said: "If this was the only tax it would constitute an unjust discrimination against the products of other states in favor of those of Alabama, and might be so laid as to amount to an absolute pro-

hibition ; but it appeared there was another tax of like amount upon all spirits manufactured in the state. Inasmuch, therefore, as the law merely subjected foreign articles to the same rate of taxation as applied to domestic, it was not an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the states."

These decisions of the supreme court have a direct application to the case under consideration. In the first place, it will be observed that the ordinance of the city of Richmond makes no discrimination in favor of or against any express company. The tax is alike upon all, graduated by the extent of the business. In the next place, the tax is not upon the telegraph message or communication, but upon the company, measured by the business in the corporate limits. The effect of the tax may be to increase to some extent the expense of telegraph communication. It is very probable that the rates of telegraphing are established by general arrangement among all the companies, whether incorporated here or abroad, and it may be that these rates are fixed with reference to state and municipal taxation as to other necessary expenses. But the same thing is true as respects railroad companies engaged in the transportation of passengers and freight and domestic goods. A tax upon them is indirectly a tax upon such transportation. But no one ever questioned the constitutional power of a state to lay a tax upon its railroad companies.

The same principle applies to express companies incorporated under the laws of one state, establishing its offices in other states, and engaged in the transmission of matter internal and external.

In *Osborne v. Mobile*, 16 Wall. 479, the supreme court say, although the ultimate effect of the tax may be to increase the cost of transportation, it is within the general authority of the state to tax persons, property, business, or occupations within the state.

The mistake made in all this class of cases is in failing to distinguish between commerce itself and what may be termed a mere instrument of commerce. Telegraphic communication is not commerce: "it is not a subject of trade and barter offered in market as something having an existence and value independent of the parties to them." It is not an intercourse — though it may be, and doubtless is, an important and valuable instrument or agency by which intercourse is carried on between the different parts of the country. It cannot be said, however, that this intercourse is purely of a national character, affecting the commercial interests of all the states, and therefore requiring exclusive legislation by Congress. Conceding that Congress may regulate the telegraphic business of this country, it has not done so; and in the absence of any such legislation on the subject, there is no valid objection to a system of state taxation upon these companies in return for the protection they receive. They are incorporated under state laws, controlled by state regulations, and protected by state authority. It is true they are engaged in transmitting government messages at rates fixed by the postmaster general; but the railroads perform duties of a similar character in carrying the mail; so also the stage-coaches. They are all subjects of state regulation, and are therefore necessarily liable to state taxation. The contract with the government for the transmission of its messages is in no just sense a regulation of commerce. These terms, "to regulate commerce," are well

understood to mean the power to prescribe the rules by which commerce is to be governed. Hay on Com. § 1061. The very fact that Congress has undertaken neither to exclude state taxation, nor to prescribe any regulations for the various telegraph companies, indicates very clearly that the whole subject was intended to be left to the states under whose laws they are incorporated.

Another ground taken by the plaintiff is, that the company is an important agency of the federal government in the management of public affairs, and as such no state or municipal corporation is authorized to impose a license tax upon its business, whereby the operations of the government may be impaired or obstructed. This view is based mainly upon the provisions of the Act of Congress of the 24th July, 1866. This act authorizes any telegraph company, organized under the laws of any state, to construct lines of telegraph over any portion of the public domain, along any of the military or post roads, and across any of the navigable waters of the United States.

Authority is also given them to take from the public lands any material needful in the construction and operation of their lines of telegraph, and also to appropriate any portion of the public lands for their stations, not exceeding forty acres for each station. The act further provides, that communications of the government, its officers and agents, shall have priority over all others in their transmission over the lines, at rates fixed by the postmaster general. The provisions of this act were accepted by the plaintiffs, and the terms of government communication fixed accordingly by the postmaster general, and agreed to by the company. It is argued, that if the state or any of its municipalities may impose a tax upon, or require a license of this company, they may impose it to any extent, and the effect may be to deprive the company altogether of the power to serve the government, or, at any rate, to impair its efficiency.

It is very clear that the states are prohibited from taxing either the property of the federal government or the instrumentalities by which its powers are carried into execution. This doctrine is well settled, and no one doubts its application to public corporations or other agencies created by the federal government for carrying into execution national objects and purposes. But none of the cases have gone so far as to affirm, that because the federal government enters into a contract with a corporation or a natural person to perform certain services this operates as an exemption from all state taxation. Can it be that a railroad company, by entering into an arrangement with the postmaster general to carry the mails, can escape the payment of its just public dues upon the pretext that its capacity to serve the federal government may be thereby impaired? Chief Justice Marshall, in *Osborne v. United States Bank*, 9 Wheat. 738-860, has given a complete answer to that question. In that case it was argued that the tax imposed upon the Bank of the United States by the legislature was constitutional, because the bank was established for private benefit, and was founded upon contract between individuals having private trade and private interest for its great and principal object. The chief justice said if these premises were true, the conclusion would then be inevitable. A private corporation engaged in its own business with its own views would certainly be subject to the taxing power of the

state, as any individual would be, and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs would no more exempt its private business from the operation of that power than it would exempt the private business of any individual employed in the same manner. But the premises are not true. The bank is a public corporation, created for public and national purposes. It is not an instrument which the government found ready made, and has supposed to be adapted to its purposes, but one which was created in the form in which it now appears, for national purposes only.

The very reverse of all this is the status of this company. It was not created by the federal government. It was not organized under any act of Congress, but under the laws of the State of New York. It is a private corporation, created for individual benefit and for the benefit of the private stockholders, carrying on business here under the authority of Virginia statutes, and protected in its franchises and the enjoyment of its property by state laws and the police power of the city government. The federal government has granted it certain privileges in consideration of the performance of certain services at certain specified rates of compensation. But the government has no interest in it and no concern with it, any further than the performance of these services. So long as these are not interfered with by the regulations of the states, it is no concern of the federal government whether a tax is imposed at all, or whether it is upon the property, or the franchise, or the business of the company. It is not pretended, there is not even a suggestion that the tax prevents the transmission of the government messages, or that it impairs in the slightest degree, the capacity of the company for the fulfilment of its obligations. Exemption from all state or municipal taxation might with the same propriety be claimed by all railroad companies, express companies, and others engaged in the transportation of mail matter, upon the ground that such taxation may tend to prevent the performance of the contract, or at least to impair the efficiency of those agencies in the discharge of their duties.

The decisions of the supreme court of the United States do not give the least countenance to any such pretension. They establish the contrary doctrine. One of these, the case of *National Bank v. Commonwealth*, 9 Wall. 353, will show the manifest disinclination of the court to extend this doctrine of exemption from state taxation.

In that case it was conceded that the Legislature of Kentucky might tax the stockholders upon the shares held by them in the national banks; but it was insisted that so much of the act as required the banks to pay such tax was invalid, because the banks, being instrumentalities of the federal government, are beyond the reach of state legislation. This view, however, did not prevail. The supreme court declared that the doctrine of exemption of federal agencies from state taxation had its just limitation, — a limitation growing out of the necessity in which it is founded. This limitation is, that these agencies are only exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve the federal government. Any other rule would convert a principle founded alone in the necessity of securing to the government the means of

exercising its legitimate powers into an unauthorized and unjustifiable invasion of the rights of the states. The banks are subject to the laws of the states, and are governed in their daily course of business far more by the laws of the state than of the nation. Their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state laws. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We do not perceive the remotest probability of this in their being required to pay the tax which their stockholders owe to the state for the shares of the capital stock, when the laws of the federal government authorize the same.

In *Thomson v. Pacific Railroad*, 9 Wall. 579, the same doctrines are still more strongly stated. In that case the question was as to the validity of a tax imposed by the Legislature of Kansas upon the railroad and telegraph property of the Union Pacific Railway Company. Exemption from this taxation was claimed upon the ground, that, although the company was incorporated under the laws of Kansas, Congress had granted it lands and subsidies to a large amount, in consideration of which the company had executed a mortgage upon its property for the payment of *five per cent.* of its net gains, and had agreed to render services also in the transmission of messages, in the transportation of mails, troops, munitions, and other property at reasonable rates of compensation: and it was insisted that the effect of the tax would be to impede and embarrass the company in the performance of these services as an agency of the government. Chief Justice Chase, in delivering the opinion of the court, dwelt at some length upon the distinction between a corporation created by the federal government for national purposes, and corporations deriving their existence and exercising their franchises under authority of state laws, but employed by the national government for certain duties and services. As to the latter, while Congress may exempt them from any state taxation, which will really prevent or impede such services, yet in the absence of legislation by Congress to indicate that exemption is deemed essential to the performance of the governmental services, it cannot be claimed upon the mere ground that the corporation is employed as an agency of the government.

It is true that the tax in this case was upon the property of the railroad company; and the learned counsel seems to suppose there is a material distinction between such a tax and a tax upon the business of a corporation. But the reasoning of the court does not justify any such distinction. It applies equally to both forms of taxation. Indeed, Chief Justice Chase expressly says: "No one questions that the power to tax all property, *business*, and persons within their respective limits is original in the states, and has never been surrendered. It cannot be so used as to defeat or hinder the operations of the national government; but it will be safe to conclude in general, in reference to persons and state corporations employed in government service, that where Congress has not interfered to protect their property from state taxation, such taxation is not obnoxious to the objection suggested."

These observations apply as strongly to a tax upon business as a tax

upon property. Indeed there is no valid distinction between the two, so far as the principles of this case are concerned. The cases do recognize a distinction between taxation of the property belonging to a private corporation employed by the general government, and taxation of the instrumentalities or means of the government in the possession of such corporation. The state may tax a banking institution, but it cannot tax the currency or the government bonds belonging to such bank. It may tax the railroad, but not the mail, or the munitions, or other property of the government. It may tax the contractor with the government though not the contract. Such tax may be upon the property of the corporation, or it may be graduated by the amount of its business. It is no concern of the federal government, provided the tax is not prohibitory, or, at least, does not impair the efficiency of the corporation in the fulfilment of its contract with the government. Indeed a tax upon business in many instances is the only just and practicable mode of assessment. Chartered companies and individuals may carry on business to the amount of thousands of dollars without owning property, real or personal, of any conceivable value. If, whenever they happen to be employed in the service of the government, they are to be exempt from all those burdens which attach to all other persons, it is obvious that both states and cities will be deprived of most valuable subjects and sources of taxation. It is impossible to foresee the mischiefs that will arise from such a limitation upon the powers of the states. We see nothing in the Constitution of the United States, or in the decisions of the supreme court, warranting such a conclusion.

*Judgment affirmed.*

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## SUPREME COURT OF THE UNITED STATES.

[OCTOBER, 1875.]

EVIDENCE. — RAILROAD. — NEGLIGENCE.

### GRAND TRUNK RAILWAY CO. v. RICHARDSON.

Where certain buildings had been erected, by permission of a railroad company, within the lines of its roadway, it was held that evidence showing the permissive erection and occupation was competent and material.

Evidence to show a usual custom or practice of railroad companies, held to be incompetent to explain away a specific act of negligence.

Plaintiffs were permitted to show that at various times shortly prior to the occurrence of a fire, which caused the loss for which the action was brought, defendant's locomotives scattered fire while passing the property destroyed, no proof being offered that such locomotives had caused, or were similar to those which caused the fire. *Held*, that the evidence was properly allowed to go to the jury.

Construction of the statute of Vermont in respect of property destroyed by locomotive engines used by railroad companies.

The imprudent location of property in proximity to the track of a railroad company does not necessarily excuse negligence on the part of the company.

IN error to the circuit court of the United States for the District of Vermont.



Mr. Justice STRONG delivered the opinion of the court.

The plaintiffs below were permitted to adduce evidence that those of the injured buildings which were within the lines of the roadway had been erected within those lines by the license of the company, for the convenience of delivering and receiving freight. The admission of this evidence is the subject of the first assignment of error, and in its support it has been argued that it was the duty of the railroad company to preserve its entire roadway for the use for which it was incorporated; that it had no authority to grant licenses to others to use any part thereof, for the erection of buildings, and, therefore, that the license to the plaintiffs, if any was made, was void. Thus the basis of the objection to the evidence appears to be that it was immaterial. We are, however, of opinion it was properly admitted. If the buildings of the plaintiffs were rightfully where they were, if there was no trespass upon the roadway of the company, it was clearly a pertinent fact to be shown. And while it must be admitted that a railroad company has the exclusive control of all the land within the lines of its roadway, and is not at liberty to alienate any part of it so as to interfere with the full exercise of the franchises granted, we are not prepared to assert that it may not license the erection of buildings for its convenience, even though they may be also for the convenience of others. It is not doubted the defendants might have erected similar structures on the ground on which the plaintiffs' buildings were placed, if in their judgment the structures were convenient for the receipt and delivery of freight on their road. Such erections would not have been inconsistent with the purposes for which their charter was granted. And if they might have put up the buildings, why might they not license others to do the same thing, for the same object, namely, the increase of their facilities for the receipt and delivery of freight? The public is not injured, and it has no right to complain so long as a free and safe passage is left for the carriage of freight and passengers. There is then no well-founded objection to the admission of evidence of a license, or evidence that the plaintiffs' buildings were partly within the line of the roadway by the consent of the defendants. And the objection to the mode of proof is equally unsustainable. There was quite enough without the receipt of October 27, 1870, to justify a finding by the jury that the plaintiffs were not trespassers. But the receipt itself was competent evidence. It is true it was given after the occurrence of the fire, but it was a mutual recognition by the company, and by one of the plaintiffs, that the occupation of the roadway by the buildings had been, and that it was at the time of the fire, permissive, and not adverse. Taking the receipt, as the bill of exception shows, was the act of the defendants done by their agent, the engineer, who had charge of the roadbed? It was, therefore, an admission by them that there had been consent to the occupation.

The second assignment of error is that the court excluded testimony offered by the defendants, to show it was not the usual practice of railroad companies in that section of the country to employ a watchman for bridges like the one destroyed. It is impossible for us to see any reason why such evidence should have been admitted. The issue to be determined was whether the defendants had been guilty of negligence,

that is, whether they had failed to exercise that caution and diligence which the circumstances demanded, and which prudent men ordinarily exercise. Hence the standard by which their conduct was to be measured was not the conduct of other railroad companies in the vicinity, certainly not their usual conduct. Besides, the degree of care which the law requires in order to guard against injury to others varies greatly according to the circumstances of the case. When the fire occurred which caused the destruction of the plaintiffs' buildings, it was a very dry time, and there was a high wind. At such a time greater vigilance was demanded than might ordinarily have been required. The usual practice of other companies in that section of the country sheds no light upon the duty of the defendants when running locomotives over long wooden bridges, in near proximity to frame buildings, when danger was more than commonly imminent.

The third assignment of error is that the plaintiffs were allowed to prove, notwithstanding objection by the defendants, that at various times during the same summer before the fire occurred, some of the defendants' locomotives scattered fire when going past the mill and bridge, without showing that either of those, which the plaintiffs claimed communicated the fire, were among the number, and without showing that the locomotives were similar in their make, their state of repair, or management, to those claimed to have caused the fire complained of. The evidence was admitted after the defendants' case had closed. But whether it was strictly rebutting or not, if it tended to prove the plaintiffs' case, its admission as rebutting evidence was within the discretion of the court below and not reviewable here. The question, therefore, is, whether it tended in any degree to show that the burning of the bridge, and the consequent destruction of the plaintiffs' property, was caused by any of the defendants' locomotives. The question has often been considered by the courts in this country and in England, and such evidence has, we think, been generally held admissible as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company. *Pigott v. R. R. Co.* 3 Man., Gr. & Scott, 229; *Sheldon v. R. R. Co.* 14 N. Y. 218; *Field v. R. R. Co.* 32 N. Y. 389; *Webb v. R. R. Co.* 49 N. Y. 420; *Cleveland v. R. R. Co.* 42 Vermont, 449; *R. R. Co. v. Williams*, 42 Ill. 358; *Smith v. R. R. Co.* 10 R. I. 22; *Longabaugh v. R. R. Co.* 4 Nev. 811. There are, it is true, some cases that seem to assert the opposite rule. It is of course indirect evidence, if it be evidence at all. In this case it was proved that engines run by these defendants had crossed the bridge not long before it took fire. The particular engines were not identified, but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire. And it seems to us that, under the circumstances, this probability was strengthened by the fact that some engines of the same defendants, at other times during the same season, had scattered fire during their passage. We cannot, therefore, sustain this assignment.

It is contended further, on behalf of the defendants, that there was error in the court's refusal to direct a verdict in their favor because a large part of the property destroyed was wrongfully on their railway,

and not within the purview of the statute of Vermont, on which the plaintiffs relied. If, however, we are correct in what we have heretofore said, it was not for the court to assume that any part of the property was on the roadway wrongfully, and to instruct the jury on that assumption. And even if it had been wrongfully there, the fact would not justify its destruction by any wilful or negligent conduct of the defendants. In *Bains v. R. R. Co.* 42 Vermont, 380, it was said that a railroad company, in the discharge of its duties and in the exercise of its right to protect its property from injury to which it is exposed by the unlawful act or neglect of another, is bound to exercise ordinary care to avoid injury even to a trespasser. If this be the correct rule, and it cannot be doubted, how could the circuit court have charged as a conclusion of law that the plaintiffs could not recover because their property was wrongfully within the lines of the defendants' roadway?

Again, the court was asked to direct a verdict for the defendants, for the alleged reason that the damages were too remote. The bill of exceptions shows that the fire originated in the bridge of the defendants and spread thence to the mill and other property of the plaintiffs, and we are referred to the rulings in *Ryan v. The New York Central R. W. Co.* 35 N. Y. 210, and *Penn. R. R. Co. v. Kerr*, 62 Penn. St. 353, as showing that in such a case negligently setting the bridge on fire is not to be considered the proximate cause. We do not, however, deem it necessary to inquire whether the doctrine asserted in those cases is correct. It is in conflict with that laid down in many other decisions; indeed, we think, in conflict with the large majority of decisions made by the American courts upon similar cases. But we think the statute of Vermont has a direct bearing upon the defendants' liability. That statute, chapter 28 of the General Statutes, secs. 78 and 79, is as follows:—

Sec. 78. "When any injury is done to a building or other property by fires communicated by a locomotive engine of any railroad corporation, the said corporation shall be responsible in damages for such injury, unless they shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury."

Sec. 79. "Any railroad corporation shall have an insurable interest in such property as is mentioned in the preceding section, along its route, and may procure insurance thereon in its own name and behalf."

That the statute contemplates such buildings and property as was destroyed in this instance, we cannot doubt. The buildings were along the route of the railroad, though some of them were in whole or in part within the lines of the roadway. It is obvious to us that the phrase "along the route" means in proximity to the rails upon which the locomotive engines run. That the 79th section gave an insurable interest in the property, for the destruction of which the corporation was made liable, does not necessarily show that the only property intended was such as was outside the lines of the roadway. That, indeed, was comprehended, but property lawfully within the lines, which the company did not own, equally needed protection. The statute was designed to be a remedial one, and it is to be liberally construed. In Massachusetts, there is a statute almost identical with that of Vermont, and under it the supreme judicial court of that state held, in *Ingersoll v. The Stockbridge & Pittsfield Railroad Co.* and

*Quigley v. Same*, 8 Allen, 438, that the company was liable to both the plaintiffs, though the fire communicated directly from the locomotive to Ingersoll's barn, and spread through an intervening shed, which stood partly upon the railroad location, to the barn of Quigley. The court said: "There is nothing in the statement to show that any fault of the plaintiff contributed to the loss, if the buildings were lawfully placed where they stood. The fact that a building stands near a railroad, or wholly or partly on it, if placed there with the consent of the company, does not diminish their responsibility in case it is injured by fire communicated by their locomotives. The legislature have chosen to make it a condition of the right to run carriages impelled by the agency of fire, that the corporation employing them shall be responsible for all injuries which the fire may cause." These cases are directly in point as to the reach of the statute. They show that it embraces buildings on the line of the roadway, and buildings injured by fire spreading from other buildings to which fire was first communicated from a locomotive. To the same effect is *Hart v. The Western R. R. Co.* 13 Metcalf, 99. And if it be conceded that the statute is applicable only to injuries of buildings and other property which the railroad company may insure, it is not perceived why they may not obtain insurance of buildings and property on their location with their consent. But if the statute is applicable to the case, it is plain that the circuit court could not direct a verdict for the defendants for the reason that the damages were too remote.

Exception was taken at the trial to the refusal of the court to affirm the defendants' points, the first of which was, that "if the jury should find that the erection of the plaintiffs' buildings, or the storing of their lumber so near the defendants' railroad track, as the evidence showed, was an imprudent or careless act, and that such a location in any degree contributed to the loss which ensued, then the plaintiffs could not recover, even though the fire was communicated by the defendants' locomotive." We think the court correctly refused to affirm this proposition. The fact that the destroyed property was located near the line of the railroad did not deprive the owners of the protection of the statute, certainly if it was placed where it was under a license from the defendants. Such a location, if there was a license, was a lawful use of their property by the plaintiffs, and they did not lose their right to compensation for its loss occasioned by the negligence of the defendants. *Cook v. Champlain Transp. Co.* 1 Denio, 91; *Ferc v. Railroad Co.* 22 N. Y. 215. Besides, it was not for the court to affirm that even an imprudent location of the plaintiffs' buildings and property was a proximate cause of the loss.

The second request for instruction was "that, at all events, under the circumstances disclosed in the case, it was incumbent upon the plaintiffs to use due caution and diligence, and to employ suitable expedients to prevent the communication of fire." The request was broad, but the court gave the instruction asked, adding only that there was no evidence in the case to which it had any application, and we have been unable to find any in the record. A question is not to be submitted to a jury without evidence.

The third prayer for instruction was based on the assertion that "the statute upon which the action was predicated does not apply to property

located within the limits of the railroad, nor to personal property temporarily on hand." This view of the statute, as we have already remarked, is not, in our judgment, correct as a general proposition, and certainly not in its application to a case where property is placed within the lines of a railway, by the consent of a railway company, for the convenience in part of its traffic.

It remains only to add that we see no just ground of complaint of the affirmative instruction given to the jury. It was in accordance with the rule prescribed by the statute, and there seems to have been no controversy in the circuit court respecting the question whether, if the fire was communicated to the bridge by a locomotive, it caused the injury to the plaintiffs.

*The judgment is, therefore, affirmed.*

## COURT OF APPEALS OF VIRGINIA.

(To appear in 28 Gratt.)

WILL. — OF THE VALIDITY OF BEQUESTS IN FAVOR OF PERSON WHO PREPARES THE WILL.

### RIDDELL v. JOHNSON'S EXECUTOR.

1. A bequest in favor of an attorney who writes the will is not necessarily invalid.
2. The *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator.
3. If a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument; in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.
4. J. was an unmarried man with a large property, having a large amount in bonds. B. had been his counsel for years, in whom J. had great confidence, and for whom he had a strong regard. In February, 1867, B. wrote J.'s will, in which he gave the most of his real estate to a number of his illegitimate children, who were colored persons. He then did not dispose of his bonds, which were in B.'s hands for collection. In June following J. sent for B. to write a codicil to his will, and after some previous provisions as to real estate among the same parties, and providing for the payment of his debts and expenses of administration, and any orders he might draw upon B. in his lifetime out of the collections from the bonds, he gave whatever remained of these bonds in the hands of B. at J.'s death to B. absolutely. J. had a number of next of kin, and among them two sisters, to none of whom did he leave anything. It being clearly proved that J. was entirely competent to make a will; that he dictated the bequest in favor of B. without any suggestion from B. or any other person, and repeated it; that it was read to him, and he clearly understood it, and intended it to be as it was written: and it appearing further that he had been on bad terms with his family for years, and had expressed more than once his determination that none of them should have any of his estate; the bequest to B. was held to be a valid bequest.

THIS was a suit in equity in the circuit court of Appomattox County, brought in September, 1871, by Richard Johnson and many others, heirs

at law and next of kin of John H. Johnson deceased, against Albert Thornhill, his executor, Thomas S. Bocock, and others, to set aside the last clause of a codicil to the will of the said John H. Johnson, deceased. The court made an order in the cause, directing an issue *devisavit vel non* to be tried at its own bar, in which Thornhill the executor, and Thomas S. Bocock the legatee, in the said clause of the codicil, should be plaintiffs, and the plaintiffs in the cause should be defendants.

On the trial of the issue Albert Thornhill, the executor, was offered as a witness to support the will, security having been given for the payment of the costs; and he was objected to by the defendants in the issue as incompetent, on the ground that he was one of the plaintiffs, named as executor and qualified as such, and also interested in the suit. But the court overruled the objection and admitted the witness, and the defendants excepted.

In the progress of the trial the defendants proposed to introduce James Gooding as a witness. His wife was one of the heirs at law of the testator, and they were plaintiffs in the suit; but they had executed an assignment of all their interest in the estate. The plaintiffs in the issue objected to him as a witness, on the grounds that he and his wife were parties, and he was liable for costs; and the court excluded him, and the defendants excepted.

After the evidence had been concluded the plaintiffs in the issue moved the court to give to the jury the following instructions:—

1. That the paper mentioned in the issue, in order to be the will of the testator, John H. Johnson, must be proved to have been executed by him when he was of sound mind, according to the formalities prescribed by the statute, to wit: Must be proved to have been signed by him in the presence of the subscribing witnesses, and to have been attested by them in his presence, and in the presence of each other, all being present together; and the burden of proving this is upon the plaintiffs in the issue, Albert Thornhill and Thomas S. Bocock.

2. That the last clause of said paper, so far as it gives a beneficial interest to Thomas S. Bocock, must be regarded as a testamentary bequest, and its validity tested by the laws of testamentary bequests, and not by the law of contracts.

3. That if it be proved that Thomas S. Bocock, who wrote said paper, was at the time of such writing the attorney of John H. Johnson, and is himself a large beneficiary under its provisions, this raises a suspicion against it, and makes it the duty of the jury to be vigilant and jealous in examining the evidence in its support. But if the suspicion, which such fact ought generally to excite, be removed, and if it be proved that the said paper was prepared according to instructions freely and spontaneously given by the testator, and was distinctly read over to, and its purport understood by him after its preparation, then the jury may find that it is the true will of the testator; it being the law of the land that an attorney may take a benefit under the will of a client if no undue influence was exerted by him over the testator, and the will was not executed under any mistake or misapprehension.

4. That if it be proved to the satisfaction of the jury that the said John H. Johnson, for a number of years of his life, extending down to

the execution of said paper, entertained a feeling of aversion and dislike for his relations, who would by law be his next of kin and heirs at law, and had a fixed purpose not to give them any part of his estate, then this fact is sufficient to rebut any presumption against said paper, arising merely from the fact that none of said relations are made beneficiaries therein.

5. That unless the jury believe from the evidence that one or both of the propounders of the will, or somebody for him or them, induced the said Johnson to make said paper, or some provision thereof, by force, coercion, or by importunity which he (Johnson) could not resist, or procured the same by some other unfair means or practice, then the said paper cannot be held void on the ground of undue influence; it being the true interpretation of the law of *wills* that the influence to avoid a testamentary bequest must amount to force or coercion, and impose on the testator a provision not in accordance with his own *free, unbiased will*.

6. That neither sickness, old age, nor impaired intellect, even if the jury believe from the evidence that any one or all of them existed in this case, are sufficient to render void the provisions of said paper, or any of them; but if the jury also believe from the evidence that the testator at the time of executing the same "was capable of recollecting the property he was about to dispose of, the manner of distributing it, and the objects of his bounty," then they must find that he had legal capacity sufficient to make a valid disposition of his estate.

7. And finally, if the jury believe from the evidence that the paper mentioned in the issue was signed and executed by the testator according to law, as set forth in the first instruction, that its several provisions were attested with the full consent of his will and understanding, uninfluenced by importunity and without any fraud practised upon him by the propounders of the will, or either of them, or any other person, and that the testator had adequate testamentary capacity, then the said paper and all its provisions is the true will of said John H. Johnson, and it is the duty of the jury to find accordingly.

And the defendants in the issue moved the court to give to the jury the following instructions, to wit:—

1. If the jury believe from the evidence that on the 17th day of June, 1867, Thomas S. Bocock was the sole professional adviser, as an attorney at law of John H. Johnson, and had been such for some years prior to said time, and was on that day employed in his said capacity of attorney and professional adviser to prepare a codicil to the will of said Johnson, which will he had previously prepared for him on the 18th of February, 1867, and did prepare the codicil to said will, which codicil is dated June 17, 1867, and was probated on the 9th day of August, 1867, and that in the preparation of said codicil said Johnson had no aid from any other person than said Bocock, further than that Albert Thornhill, who is named as executor in the codicil, was present during its preparation, though not interfering in the matter beyond privately urging Bocock to write the bequest in his own favor when he saw Bocock hesitate to do it; and further, that when the preparation of the codicil was completed, and it was ready to be witnessed, William T. Pankey and James A. Agee, two neighbors, were called in to witness its execution, who read the codi-

oil to him, and satisfied themselves that he understood it, and then duly attested it in his presence, and at his request, then, although they believe that the decedent was competent to make a will, and did fully understand what he was about, and fully understand the contents of the codicil, and that the conduct of Bocock, the attorney, was fair, and his purposes honest, and that he did not designedly take, or conceive that he was taking, any advantage of his professional influence over his client, they must find that the bequest made under such circumstances to Bocock is contrary to the policy of the law and invalid, and that so much of said codicil as contains said bequest is not the true will and testament of John H. Johnson.

2. The jury are instructed that, under the circumstances under which the codicil of June 17, 1867, to the will of John H. Johnson was made, as shown by the testimony of the witnesses for the plaintiffs in this issue, they are bound to presume that the bequest in said codicil, contained in favor of Thomas S. Bocock, was made under undue influence.

3. The jury are instructed that as the testamentary disposition in favor of Thomas S. Bocock, made in the codicil of June 17, 1867, to the will of John H. Johnson, appears from the evidence in this case to have been formed in Johnson's mind in the presence of said Bocock, and while he was actually employed as the attorney of said Johnson, in preparing the codicil to his will, and while Johnson was without any competent independent advice, they are bound to presume, from the relation of the parties, that the bequest to said Bocock was the offspring of undue influence; and even if the subsequent execution of the codicil, in the presence of the attesting witnesses, and the withdrawal at that time of Bocock from Johnson's presence, and the other circumstances attending the execution, should satisfy the jury that this influence had been overcome by Johnson before the final execution of the codicil, yet when Bocock subsequently heard of the wish of Johnson to alter this clause of the codicil, and contented himself with merely writing the letter and accompanying papers of June 25th, 1867, he so far failed — no matter how honest his purposes — in that full discharge of his professional duty which the law exacts from an attorney in his circumstances as to render invalid the bequest in his favor.

4. The jury are instructed that so much of the codicil of the 17th June, 1867, to the will of John H. Johnson, as makes a bequest to Thomas S. Bocock, having been prepared by the said Bocock as the attorney and professional adviser of said Johnson, cannot, under the law of this court, be held as a part of the true last will and testament of said Johnson, unless it be found by them from the evidence, that, in the making of so much of said codicil as makes said bequest, the said Johnson had the aid of independent advice from some competent third party; and that the mere presence of Albert Thornhill, who was named as executor in the codicil, and whose only active intervention in making of said codicil was his privately urging on Bocock to write the bequest in his own favor, did not constitute or furnish such independent advice.

5. The jury are instructed, that to enable the plaintiffs in this issue to sustain so much of said issue on their part as involves the validity of that clause of the codicil of June 17, 1867, to the will of John H. Johnson,



which contains the bequest to Thomas S. Bocock, they must have shown from the evidence, to the satisfaction of the jury, that Johnson was not only competent to make a will and fully understood the contents of said codicil, but that he intended the same, at the time of executing it, as a final disposition, in the event of his death, of the property embraced in it; and that his testamentary papers in regard to said property was not formed under the influence of the presence of the said Bocock, as his attorney and professional adviser, the existence of which influence the jury are bound to presume from the relation of the parties and their presence together; and that he had, during the preparation of the codicil, or prior to its execution, such independent aid or advice from some competent third party as actually restored him, before its execution, to entire freedom from any such influence.

6. The court instructs the jury that though they should believe, from the evidence, that on the 17th day of June, 1867, John H. Johnson was of competent mental capacity to dispose of his property, yet, if they should further believe, from the evidence, that by the will of the said John H. Johnson, bearing date the 18th day of February, 1867, disposing of a part of his estate, Albert Thornhill was appointed the executor thereof, and Thomas S. Bocock was appointed his legal adviser thereunder, and a referee to settle any disputes that might arise under the same as therein specified; and that the said Albert Thornhill and the said Thomas S. Bocock accepted the said several trusts therein respectively imposed upon them; and further, that at and before the said 17th day of June, 1867, the said Thomas S. Bocock was, and had been for some years, the general counsel and attorney of the said John H. Johnson in and about all of his legal business, and that on that day the said Thomas S. Bocock was employed as such attorney and counsel by the said John H. Johnson, in and about the special business of the drafting and execution of a codicil to the said will, designed to be a further disposition of the estate of the said Johnson, and that the said Thornhill, appointed the executor of the said will as aforesaid, was present and took an active part in the transactions thereof, and that the said Bocock, acting as such attorney and counsel, drafted the last clause of said paper, purporting to be a codicil to the said will, with the knowledge and approval of the said Albert Thornhill, executor as aforesaid, and named as the executor in the said alleged codicil, and that the said attorney and counsel failed and omitted, with the knowledge and approval of the said executor, to attend personally to the execution of the said alleged codicil, and withdrew himself from the room of the said Johnson, and remained out of doors while the said executor, together with the other subscribing witnesses to the said paper, went into the room and by the bedside of the said Johnson to take charge of the execution of the said papers by the said Johnson as a codicil to his will, and the said paper was then executed by the said Johnson without any advice, either from the said attesting witnesses or from any other person, and that afterwards the said Johnson expressed a wish to change that clause in the said paper which directed how his property and money should be disposed of after his death, and that said wish was communicated to the said counsel and attorney by the said executor, and the said counsel and attorney did not personally attend on the said John-

son for the purpose of executing the said wish, or send to him a competent and disinterested adviser, other than the said executor, to execute the said wish in the premises, but instead thereof, while remaining away himself, sent to the said Johnson by the said executor the letter of the 25th of June, 1867, together with the papers accompanying the same therein referred to, and never thereafter went to see the said Johnson before his death (on the 10th day of July, 1867), and no sufficient reason appears why his said counsel and attorney should not have done so upon said special business under the circumstances of the case in view of his relation to his said client as aforesaid, and of his interest under the said alleged codicil; and that his said client was in advanced old age, and afflicted with a disease or diseases expected soon to end in his death, and that the said executor and said confidential counsel and attorney were aware of his condition, and had notice of the same; and that said counsel and attorney, after the execution of the said paper by his said client, and before his death, was in his immediate neighborhood and failed to call and see his client upon the said subject, but upon the death of his said client promptly went to his house, and, with the consent of the said executor, took charge and control of the property and bonds referred to in the said latter clause in said paper, and that he afterwards used the same with the knowledge and consent of the said executor as if the said paper were a valid codicil; and that the said Thornhill, named as executor in said will, and said paper purporting to be a codicil, has never rendered any account of his transactions as executor, and has never received any money from the said counsel and attorney, or paid any debts due by said estate, but has given and submitted the whole management of said matters under the said paper of the 17th of June, 1867, to the control of the said counsel and attorney, and the said counsel and attorney has himself rendered no account of his transactions in respect to the same, and that the property and effects which came into the hands of the said counsel and attorney, under the said last clause of said alleged codicil, were of large amount and greatly exceeding in value the indebtedness of said estate, then the jury must find that said last clause of said paper is null and void, and is not a part of the will of the said John H. Johnson.

And the court gave the jury the said instructions asked for by the plaintiffs in the issue, and rejected and refused to give the said instructions asked for by the defendants in the issue; to which said several rulings of the court the defendants in the said issue excepted.

The jury found by their verdict, "that the paper writing dated the 17th day of June, 1867, purporting to be a codicil to the will of John H. Johnson, deceased, is in all its parts and provisions the true will of John H. Johnson, deceased." And the plaintiffs in the suit, the defendants in the issue, moved the court to set aside the verdict of the jury, and to refuse to enter any decree in accordance therewith, because the said verdict is contrary to law and the evidence. But the court overruled the motion, and the plaintiffs excepted; and the court spread the facts proved upon the record.

Be it remembered, that on the trial of the issue in this case the following were all the facts proved before the jury:

It was proved that John H. Johnson died at his residence, in the county

of Appomattox, on the 10th day of July, 1867, about three o'clock in the afternoon. That on the 18th day of February, 1867, he made a will, which was prepared for him by Thomas S. Bocock, who was then, and had for several years before that time been his attorney at law and legal adviser in all his business matters requiring the aid of an attorney. That said will was witnessed by William T. Pankey, James A. Agee, and Albert Thornhill. That on the 15th day of June, 1867, Thomas S. Bocock, who had been sent for by John H. Johnson, went to the house of said Johnson late in the afternoon, and learned from Johnson that he wished him, Bocock, to prepare for him a codicil to his will; whereupon Bocock told him that it was then too late to prepare the codicil that day, and undertook to come again on Monday and prepare it; and on Monday morning, about an hour after sunrise, Bocock accordingly reached Johnson's house again. When Bocock reached there on this occasion he found Albert Thornhill there. Albert Thornhill lived not far off, and had gone over that morning to see Johnson, not knowing anything of any purpose to make a codicil to the will. When Bocock arrived he told Johnson that he had come there to complete that little item of business, and that if he wished it done it would be necessary for Mr. Thornhill to go home and get the will, which was in his possession. Mr. Thornhill went and brought the will, and Mr. Bocock then told Mr. Johnson that he was ready to proceed; whereupon the preparation of the codicil began. Mr. Johnson, who said in the beginning that he would give nothing to his relations, had given several directions about disposing of his lands, which Mr. Bocock put in writing to his satisfaction, and they came to the disposition of his money and bonds and the residue of his estate. Mr. Johnson said he was "A little at a loss how to manage that," or "Now you are too hard for me," or some such expression; and he spoke of his money being mostly out and barred by the stay law, and said that after all his just debts were paid, and particularly if many such debts came against him as Mosby's debt, there would be but little left; and said further, that he had thought of giving his sister Sally (Mrs. Dunn) and his sister Betsy (Mrs. Miller) \$500 each, but that he had heard they had threatened to sue his estate as soon as he was dead, and he would give them nothing; and said further, alluding, as witness supposed, to his relations, that he would not give any of them anything—they might get what they could at the end of the law: and he said to Mr. Bocock and Mr. Thornhill, "I want you to give me your advice." Mr. Bocock told him if he (Bocock) was to advise him the will would not be his own, but his (Bocock's). He hesitated, and then asked Mr. Bocock how it would do to collect his money and put it in bank without interest. Mr. Bocock told him if he did so, and died without disposing of it, his relations would get it. Johnson said he did not want that; he did not want them to have it. He then asked Bocock how it would do for him (Bocock) to collect it, and hold it subject to his order. Bocock said that'll do. Johnson said, Suppose I draw orders on you. Bocock said he would accept them, payable when money sufficient was collected. Johnson then said, Now I can arrange it, and he told Mr. Bocock that if he did not order it out of his hands in his lifetime it was to be his. That it was now eleven or twelve o'clock, and Johnson called for his woman and ordered her to make a pitcher of lemonade, which was done, and she handed a

glass to Thornhill and one to Bocock, who offered his to Johnson, who declined, and remarked, "These gentlemen would probably like to have theirs spiked," and ordered her to get his bottle of liquor. Then the business was suspended, because Johnson seemed to be tired, and he was allowed to rest until two or three o'clock, during which time Bocock and Thornhill withdrew from Johnson's room. Then Bocock and Thornhill again entered his room, and he seemed to be asleep, when Bocock said, Rouse him and let's get to work; then the business was resumed, and Johnson said a second and third time that he wanted him (Bocock) to collect his money, and hold it subject to his orders during his lifetime. Bocock asked what was to be done with it in case of his death. Johnson replied, If I do not order it out of your hands it will be yours. Bocock seemed unwilling, and refused to write that down, and said to Thornhill that he had never done anything to bring reproach on himself. Thornhill in a low voice, unheard by Johnson, who was a little deaf, told Bocock he ought to do so, as Johnson had told him several times; that Mr. Johnson had sent for him to write his will, and that seemed to be his will; and Johnson himself said, with some impatience, "I've told you several times; write it as I say." Bocock then wrote it down. Johnson then asked Bocock how it would be if he (Johnson) should draw orders on him before he had collected the money. Bocock told him he would accept the orders, payable when the money came to his hands. In the course of the preparation of the codicil, Bocock, who put it all down first in the form of notes, read over the notes to him several times, and the list of bonds appended to the codicil was prepared at the dictation of Johnson from memory. When it was completed, Thornhill, who had been told by Johnson that he wanted the same witnesses to the codicil who witnessed the will, sent for William T. Pankey and James A. Agee for the purpose. They came about night. Bocock, who was in the yard when Pankey came, gave him the codicil, and Pankey took the codicil from Bocock and went in and read it to Johnson. This was by candlelight. Twice during the reading Pankey asked him if he heard. Johnson both times said he did, and once said he had already heard it read. When the reading was completed Johnson signed it, and Thornhill, Agee, and Pankey subscribed it as witnesses at his request, all three of them and Johnson being together when this was done. In the opinion of the subscribing witnesses Johnson was fully competent to make a will, and the witnesses took pains to satisfy themselves on this point. The will and codicil are given hereinafter.

During the preparation of the codicil, several colored people, formerly slaves of Johnson, were about the house, among them Martha, who had been kept by him as a wife, and Albert and Washington, who were reputed to be his natural children. They withdrew from the room when the writing was done, but Albert and Washington were in the adjoining room, the door of which was open, and heard and saw all that passed, as Johnson was a little deaf, and conversation with him was necessarily loud. Johnson was an old man, seventy years old or more; at least that in 1859. His health on the 17th June had become bad. He had been for some time confined to his bed, but could get up and even sit up. He continued after the 17th June to grow worse until his death. The main symptoms

of his disease were dropsy and inability to retain his urine, and he required constant attention, which was chiefly given him by his woman Martha. He slept a good deal, but had a habit, many years before his death, of appearing listless and closing his eyes, when really he would be watchful and attentive.

Between 1848 and 1860 William M. Cabell was his attorney and legal adviser. In the year 1859 Cabell prepared a will for him, by which he freed his negroes and gave to his natural children, some of whom were white and some black, the bulk of his estate, but nothing to any lawful relation. He often, during the time Cabell was his attorney, expressed himself to Cabell as very hostile to his relations, with some of whom he had much bitter litigation, and said they had worried him all his life with lawsuits, and had hunted him like a wild beast, and he often declared his purpose of never giving them a cent, and to other witnesses he subsequently made similar declarations.

By the will of 1859 he made Cabell and one James A. Wright his executors, and gave each of them \$5,000 in lieu of commissions as executors.

Some days after the codicil was executed Johnson sent for Thornhill and said to him that Susan Johnson, and perhaps others, had been telling him he had given all his property to Bocoock, and had no control over it. Thornhill told him it was not so, and that he would not have witnessed any such will, and told him he would go or send for any person he (Johnson) might wish to write the codicil over for him. He said no, he wanted no one but Mr. Bocoock, and that Mr. Bocoock would come down after his court in Lynchburg was over. Johnson said he wanted some alteration made in the last clause of his codicil, but what it was Thornhill could not get him to say. Thornhill told him he could not wait, because he could not live long. On the 24th June, Thornhill went to Lynchburg and saw Bocoock, and told him what had taken place between him and Johnson since the codicil was written. Bocoock thereupon wrote to Johnson, and sent, by Thornhill, a letter and two accompanying papers. (See *post.*)

Thornhill took them to Johnson on the 26th June. Johnson rose up and sat on the side of the bed and read the letter, but not the accompanying papers, and said he was satisfied, and that Mr. Bocoock understood the matter as he did, and that he had retained full control over his property, and if it pleased God he should live five or six months he might make some little change in the latter clause of his codicil.

Thornhill went to see Johnson every day but two from the 17th June till he died. He lived one and a quarter miles from Johnson. When he took the letter and accompanying papers from Bocoock in Lynchburg, it was understood between him and Bocoock that if Johnson wanted Bocoock to come down before his court in Lynchburg was over, he, Thornhill, would send for him and let him know, and Bocoock would come at once, which understanding was, however, not communicated to Johnson. No further communication took place between Thornhill and Bocoock until the death of Johnson, at which time Bocoock was at his own plantation, about three miles from Johnson's.

Bocoock had some few days before come down to his plantation from Lynchburg, on his way to Buckingham court, where he was on Monday, the 8th day of July, and from which place he returned to his plantation

on Tuesday, the 9th day of July, and when the death took place on the 10th July, he was sent for by Thornhill and went over to Johnson's at once.

On the night of the 17th June, after the codicil was finished, Washington Johnson, one of his colored natural children, approached his bedside and said to him, Now, to a moral certainty, you have given Mr. Bocock everything, and have made no provision for us. He said, "I am not dead yet."

It was proved by Cabell that while he was attorney for Johnson, from 1848 to 1860, Johnson was a man of strong mind, hard in his disposition, even with his natural children, of inflexible will, and of a suspicious disposition, and extremely bitter in his feeling towards his relations.

All the subscribing witnesses knew Johnson well, but Agee and Pankey were neither intimate with him, and very seldom saw him. Thornhill had known him for forty years, but was not in the habit of visiting him till the codicil was made, and very seldom before that time went to his house.

Some time during the war the professional relations began between Johnson and Bocock. Once during the war Johnson talked with James A. Wright, who was in the habit of transacting some of his business for him, about making a will and freeing his negroes, and talked of getting Bocock to write it for him. Wright told him that Bocock was Speaker of the Confederate Congress, and could do it as well or better than any other man.

It was proved by Cabell that during his attorneyship, and by another witness, that subsequently Johnson spoke of his estate being probably involved in litigation after his death, and declared his purpose of leaving his executor *strong-handed* to defend it. A day or two after the codicil was made, Johnson was spoken to about making some provision for his servant Martha. He said when they were slaves, all they wanted was freedom; and when they got free they wanted a home, and now they wanted everything he had, and they should n't have it. On the occasion of the conversation above referred to, between Albert and Johnson, at Johnson's bedside, Johnson said to Albert: "The stay-law and the bankrupt law are against my money. Before you were free it was nothing but freedom; then the state set you free, then you want money; now you must work for money as I did. My estate is going to be sued; they are going to sue you and your children — them in the cradle and them unborn. Oh God, I wish I could rise from the grave and hear the contention. I leave my money to Bocock; so that he can't be bought. I leave it to him to defend you till the last dollar is spent. I might give you a bond, and you might hand it to a lawyer to collect and never receive a cent. I have been trying to collect my money and failed, and if Mr. Bocock should do so and have some left, who would have a better right to it than he who labored for it?" He said also that Bocock had been injured by the war, and was a public man, and had been disfranchised, and he intended to help him.

It was proved that the circuit court of Lynchburg adjourned on the 29th June, 1867.

The will bears date the 18th of February, 1867, and in it he disposes almost exclusively of the land where he lived. From this he divided off

eleven lots, which he gave to certain persons mentioned in them ; and the remainder of the tract, which consisted of wood land, his executor was to hold for the benefit of those to whom he had given the lots of land ; all of whom were persons of color, and most of them were reputed to be his children. He appoints Thomas S. Bocock as the legal adviser of his executor, in all things touching the management of his estate, and he and the executor were to have full power to settle any difficulties arising among his devisees, about their respective interests under his will. And he appointed Albert Thornhill his executor.

The codicil bears date the 17th of June, 1867. After making some slight changes as to the wood land reserved in the will, and making some other devises of land in the county of Prince Edward, and of interest in two houses in Lynchburg, among some of the same persons mentioned in the will, he comes to the last clause, which was the subject of contest in this case, and is as follows :—

"I have deposited my bonds and claims mostly in the hands of Thomas S. Bocock, in whom I have confidence, with the understanding that I can draw on him for the money as it may be collected ; and if I shall draw for any amount before the same shall be collected, he agrees to accept said order, to be paid whenever the funds may come into his hands to pay the same ; provided the whole amount drawn for may not exceed the net amount which may come to his hands for use. Now it is my will and desire at my death he shall proceed to collect all sums due me as the laws of the land may permit, — interest when interest can be collected, and principal when that may be done, — and out of the net amount which may come into his hands, that he shall pay over to my executor whatever may be necessary for the payment of debts, also the commissions of said executor on collections made for my estate, and also all orders drawn on him by me in my lifetime, and accepted by him, as above stated ; and any amount which may remain, after these payments, in his hands, shall never be claimed by my executor, or by any other person, by any authority from me, but the same shall remain his absolute property."

To this codicil was added a list of debts made out by him at the time, twenty-seven in number ; being such as he remembered at the time, though not pretended to embrace all, or to be strictly accurate.

The letter referred to in the statement of facts proved, bears date Lynchburg, June 25, 1875, and is as follows :—

"Dear Sir, — Our friend, Mr. Thornhill, informs me that you have expressed a wish to change the clause in the codicil to your will, which directs how your money shall be disposed of after your death. It was put down just as you directed, as you will remember, and after full explanation. Mr. Thornhill will read it to you again, so that you can bear it fully in mind. I wish to have it exactly to suit you. So far as I have any connection with it I wish it to be your will, and not that of any other person. Every . . . is yours, and is altogether in your power. If it does not suit you as it stands you can change it in several modes. You can revoke the last codicil altogether, and make another if you choose, or you can make another codicil, altering the first so far as you wish to alter it ; or leaving the will and codicil to stand as at present, you can draw an order or orders on me, payable after your death, in which you can direct that your

money be given to whoever you wish. Just say who you wish to have it, and it shall be done accordingly. I send by Mr. Thornhill the form of a new codicil, and also the form of an order, such as I have indicated. He can have them, or either of them, changed to suit you. You have only to say what change you wish to make, and it shall be done. If I could leave here with propriety, I would go down immediately and aid you so far as in my power; but the circuit court is in session, and will remain in session for some days longer. As soon as my business is through I will be down.

"With best wishes," &c., &c.

The copies referred to in the letter, and sent with it were the copies of an order on Bocock directing that any net balance in his hands remaining after payment of debts and commissions of executor as aforesaid, be paid out and distributed among Johnson's relations, as the same would be paid and distributed under the laws of Virginia regulating the distribution of the money and effects of deceased persons not disposed of by will.

The form of the codicil was to the same effect.

The cause came on to be finally heard on the 28th of May, 1874, when the court made all the proceedings and evidence had on the trial of the issue a part of the record, and decreed, in accordance with the verdict of the jury, the paper writing dated the 17th of June purporting to be a codicil to the will of John H. Johnson deceased, to be in all its parts the true last will of the said John H. Johnson deceased, and that the bill be dismissed with costs. And thereupon the plaintiffs applied to a judge of this court for an appeal; which was allowed.

The cause was most elaborately argued in printed notes as well as orally by *Guy & Gilliam*, *John Howard*, and *Cosby*, for the appellants, and *Kean* and *Kirkpatrick & Blackford*, for the appellees.

ANDERSON, J. In view of the importance of this cause, the court has given to its consideration the most careful and earnest attention. And if we have erred in our conclusions, no fault is attributable to the learned counsel on either side, who have conducted the discussion with scrupulous fidelity to their respective clients, and with great research and distinguished ability.

It is not surprising that the mere announcement, that the decedent had given the bulk of his large estate to his attorney, who was the writer of his will, and a stranger to his blood, to the exclusion of his lawful kindred, should have excited comment in the country. And the fact, that the writer of the will was an eminent member of the profession, and had filled various posts of honor and high distinction in the service of his country, would naturally cause painful reflections in the public mind, and especially amongst the members of a profession which is so closely connected with the administration of justice, and who, in general, have been keenly sensitive, and justly so, to anything which might bring reproach or stain upon their fair and honorable escutcheon.

By the civil law, if a person wrote a will in his own favor, it was rendered void. I am not prepared to say that such a provision in our law would not be consonant with public policy, and a safeguard to public morals, especially when the writer of the will was the attorney of the testator. Not that such a disposition of his estate might not fairly be made by a testator, and that he might not justly regard his attorney his best



friend, and the most worthy object of his benefaction, and bequeath his property to him free from all restraint and undue influence; but considering the relation of confidence between the client and his attorney, and the capacity which a venal and unscrupulous attorney would have to abuse that confidence, and considering the infirmity of human nature, which requires from the best of men the daily prayer, "Lead us not into temptation," and the relation of the legal profession to the pure and faithful administration of the laws, and the importance of its occupying a position which raises it above suspicion, it is argued with much force, that an attorney should be absolutely incapable of taking a benefaction from his client by gift *inter vivos* or by will.

On the other hand, it may be argued that by the law of England and America the testator has the right, as he ought to have, to bestow his property on whom he will. He has the right to select the objects of his bounty. That his attorney may be the best friend he has in the world and the most worthy object of his benefaction; and if he has capacity to make a will, and freely and of choice desires to bequeath his estate to him, he ought not to be deprived of that privilege. Whether this be a just conclusion as to what the law should be, or whether it is best that the rule of the civil law should prevail, I think the current of decisions shows that it has not been adopted to its full extent as a rule in England or America.

In England it has not, and is distinctly so declared. 1 Williams on Ex. 4th Amer. from last London edition, p. 91. And the writer adds: "The act is not absolutely void, even though the person making the will in his own favor is the agent or attorney of the testator;" but the suspicion thereby is, for obvious reasons, greatly increased.

In *Billinghurst v. Vickers*, 1 Phill. 187, it is held that the act is not actually defeated, as it was by the civil law. To the same effect are *Paske v. Ollatt*, 2 Phill. 323; *Barry v. Butlin*, 1 Curtis, 637; *Baker v. Bott*, 2 Moore P. C. C. 317; *Hitchins v. Wood*, Ib. 355, 436. The same is held in the American cases. A will by a client in favor of an attorney is not absolutely invalid. The existence of that fiduciary relation does not annul the act. *Wilson v. Moran*, 3 Bradf. 172. To the same effect is *Crispell v. Dubois*, 4 Barb. 393; *Cramer v. Cruinbaugh*, 3 Md. 491; *Watterson v. Watterson*, 1 Head's (Tenn.) 1; *Adair v. Adair*, 30 Ga. 104; *Nexsen v. Nexsen*, 3 N. York Court of Appeals Dec. 360; *Goodacre & Taylor v. Smith*, 1 Law R. Pr. & D. 359. In *Coffin v. Coffin*, 23 N. Y. 9, Comstock, C. J., said: "It is not a rule, or a principle of the law of testaments, that the draughtsman of a will cannot be an executor, or take a benefit under it.

The counsel for appellants rely on *Meek & Thornton, Ex'rs, v. Perry & Wife*, 36 Miss. 256, and *Garvin's Adm'r v. Williams et al.* 44 Missouri, 465, as maintaining the rule of the civil law. Though the reasoning of the judges may tend in that direction, the decision in neither case goes to that extent. They do not hold that the will is absolutely void, but only that the relation of confidence raises a *prima facie* presumption of undue influence, which, unless rebutted, the will cannot stand.

The Mississippi case turned upon an instruction given by the court of trial to the jury in the following words, to wit: "That the law watches

with jealousy transactions between guardian and ward; and if the jury believe that Louisa McKinnie (the ward) made a will in favor of her guardian whilst the relation of guardian and ward subsisted, the circumstances must demonstrate full deliberation on the part of the ward, and abundant good faith on the part of the guardian, or they must find against the will. The appellate court held that there was no error in the instruction.

The Missouri case also turned upon an instruction, which, reciting all the facts in the case, asked the court to declare that "the presumption arising from such fact is, that the alleged will was procured by the undue influence of J. P. Williams; and that presumption can only be repelled by satisfactory proof that no undue influence was used to procure the same."

The appellate court held, that under the circumstances in which the will was made, it was presumptively invalid, and the burden of proving its validity rested upon those who sought to derive an advantage under it. The instruction, therefore, which was refused by the court should have been given. It is clear that in neither of the foregoing cases was it held, that on the ground of the relation of confidence between the testator and the legatee the will was absolutely void, but only presumptively so, which presumption it was competent for the propounder of the will to repel. And in this last case it will be observed that there was much in the conduct of Williams, besides the confidential relation, from which the presumption against the validity of the will might arise. But in these cases the doctrines enunciated are not entirely conformable to the rules which have been adopted and established by the current of English and American decisions.

These rules, as laid down by Baron Parke in *Barry v. Butlin*, 1 Curt. Ecc. R. 637, are, first: "That the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator;" and second, "That if a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and zealous in examining the evidence in support of the instrument; in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased." These rules are approved by the court in *Crispell v. Dubois*, 4 Barb. 393; also in *Cramer v. Cruinbaugh*, 3 Md., *supra*.

In *Wilson v. Moran*, *supra*, the court says: "True, it is held that where the legatee who stands in a confidential relation to the testator *himself* draws the will, this circumstance calls for increased vigilance on the part of the court in ascertaining the validity of the will. But in such cases, the most that has been, or ought to be required, is satisfactory evidence that the testator was of sound mind, and clearly understood the contents of the will, and was at the time under no restraint. No case has gone so far as to overthrow a will duly executed, when it was shown that the party executing it was of sound mind, and clearly understood its contents, though it was drawn by the person taking the estate."

It seems to me that the rules and principles by which cases of this nature

should be decided are clearly and correctly stated in the foregoing decisions, and they are sustained by the almost unbroken current of English and American authority. Let us now apply them to the case in hand.

In the first place, I cannot doubt, upon the evidence in this record, that John H. Johnson was capable of making a will on the 18th day of February, 1867, when this will was executed, and also when he executed the codicil on the 17th of June following. The three subscribing witnesses, who are regarded in law as placed around the testator that no fraud may be practised on him in the execution of the will, and to ascertain and judge of his capacity, all of whom are represented to be men of intelligence and respectability, were not only of that opinion (and the law makes their *opinion* evidence), but facts are proved by them and others, which, in connection with the intrinsic evidence furnished by the instrument itself, excludes all doubt that the testator was of sound disposing mind.

In the next place we will inquire, Had he knowledge of the contents of the codicil when he signed it? Being capable of making a will, it is not probable that he would have signed it without knowing what it contained. But the proof is positive and direct. It is proved that the testator himself gave instructions to Mr. Bocock, which were written down by him and afterwards read over several times to the testator and approved by him. The codicil was then written, and Mr Pankey and Mr. Agee, who together with Mr. Thornhill had attested the will, and who the testator desired should attest the codicil, were sent for, and one of them, Mr. Pankey, who had been a justice of the peace for a number of years, read it to him. The testator said he heard it and well understood it. That he had heard it several times before, and that it was written as he directed.

The proof is that "*the codicil*," after it had been written out, had not been before read to the testator, although the note of instructions had. The fair inference from the testator's remark, that he had heard it several times before, is, that there was no discrepancy between the note of instructions and the codicil. And Mr. Thornhill testifies that "all was read to Mr. Johnson in the notes," and "all was in the notes as it is in the codicil." These two things being established, — first, that the testator was capable, and secondly, that he had knowledge of the contents of the instrument, and the execution having been according to the requirements of law, — ordinarily, further proof would be unnecessary to establish the will. But this case being of the class which calls upon the court to be vigilant and jealous in examining the evidence, and to be satisfied that the paper propounded does express the true will of the deceased, which satisfaction cannot be felt whilst suspicion rests upon it, we will further inquire, Was the testator under restraint when he executed this codicil?

A valid testamentary disposition of property must be the *voluntary* act of a capable testator. In *Wilson v. Moran*, *supra*, the court said: "A will by a client in favor of an attorney is not absolutely invalid. The existence of that fiduciary relation does not annul the act; but still the circumstances call for unusual vigilance, to see that it was in consonance with the *views* and *wishes* of the testator." Baron Parke affirms, in *Barry v. Butlin*, 1 Curt. 637, that all that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance of more or less weight according to the facts

of each particular case ; in some, of no weight at all, varying according to the circumstances, — for instance, the *quantum* of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies ; but in no case amounting to more than a circumstance of suspicion demanding the vigilant care and circumspection of the court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased.

The *quantum* of the legacy and the proportion it bears to the property disposed of, according to this authority, is unfavorable to this will. But it is still only a circumstance of suspicion, which calls for vigilant care and circumspection. The turning point is, Does the instrument express the real intentions of the deceased ? The same principle is sanctioned and acted on in *Baker v. Bott*, *supra*. And in the subsequent case of *Durling v. Loveland*, 2 Curt. 225, 227, Sir H. Jenner Fust, referring to these passages in the judgment of Baron Parke, said he acceded to every one of the doctrines and principles there laid down, but was not aware that the prerogative court had ever acted on any other or different. And they are recited by Judge Lomax, in his book on Executors, without dissent.

No presumption can be raised against the will or codicil in this case, from the fact that a stranger is preferred to his lawful kindred when the facts certified in the record are examined. The relation was one of hostility ; and the testator had long before formed the fixed and inflexible purpose that his relations should have no part of his estate ; which purpose it does not appear that he ever abandoned to the day of his death, though he thought at one time of making a small legacy to each of two sisters. By the will which was written for him in 1859 by his attorney, Mr. William M. Cabell, he left them nothing.

The evidence also clearly shows that he gives his illegitimate children all that he intended them to have. On whom then could he bestow the residuum of his estate ? Mr. Cabell testifies that his feelings toward Thomas Bocock were very partial. And it is also in proof that he said he intended to help him as he had been injured by the war, and was a public man, and had been disfranchised. Being unwilling to do more for his illegitimate children, and not willing that his relations should have any part of his estate, who was there that he would have been more inclined to make his residuary legatee than Thomas Bocock.

The provisions of the codicil were known by his children and relations, and by all who felt any interest. There was nothing clandestine in the transaction. No attempt was made to exclude any one from the testator's person, or to conceal the dispositions he had made of his property. The will was not only ambulatory, revocable, or alterable, at the pleasure of the testator, from the 17th of June, when the codicil was executed, until the day of his death, the 10th of July, but the disposition in favor of Bocock could be changed simply by the testator giving orders on him. During this period the testator's relations and illegitimate children might have free access to him. The woman who waited on him and nursed him, his reputed wife, as well as his natural children, had every opportunity to bring what influence they could to bear upon him to change his will as to Bocock. Some of his children and one or two of his sisters availed them-

selves of this opportunity to approach him and to persuade him to change his will. But in vain. He was inflexible. He would not even do more for Martha, his reputed wife, though advised to it by his executor. All the evidence represents him as a man of strong mind and inflexible will. His sisters succeeded in disturbing his mind by representing that he had given all his bonds and choses in action to Mr. Bocock absolutely; and he expressed a desire to have some change made in that clause of his codicil. But the letter from Mr. Bocock satisfied him that it was all right, and that its provisions were just as he had directed and desired them to be. That letter represents the state of the case truthfully, and informs Mr. Johnson that he may revoke his codicil altogether, or may alter it either by executing a new codicil, or by giving orders on him, and actually sends him formulas, by which the testator can take every dollar from him and give it to whom he will. It is objected, that Mr. Bocock makes the order payable to the testator's "relations," knowing that he was averse utterly to giving them anything. But he tells him in his letter that Mr. Thornhill can make any changes he may wish in those formulas. If Mr. Bocock inserted "relations" in the formulas, to intimate not that he should, but that he should not, make a disposition in favor of his relations, he does nothing to guard against his making a provision in favor of his illegitimate children.

It was also urged in argument in this connection, that Mr. Bocock ought to have gone to see Mr. Johnson in order to aid him in the preparation of any papers he might wish to have prepared in relation to the disposition of his bonds and other charges on the money to be collected on them. If he kept away from Mr. Johnson to prevent him changing his codicil, or from drawing orders on him in favor of other parties, such conduct would deserve the severest censure and reprobation, and might be treated as a fraud upon those in whose favor the change was contemplated, though even such conduct could not effect a revocation of a will which had been duly executed, or defeat the probate thereof. Though the fact, if it were so, could not affect the issue involved in this suit, justice impels me to say that, in my opinion, such an inference cannot be fairly drawn from the facts appearing in this record. Mr. Bocock by his letter had plainly informed Mr. Johnson of all that was necessary to enable him to change the disposition of his bonds, &c., which he had made in his codicil, and informed him of his perfect right to make any change he thought proper, and to give the property to whomsoever he chose, and furnished him with the proper form of an order on him to effect such change, which he informed him he would respect; thus giving him all the information he needed, and every facility to make the change which he could have afforded him if he had been personally present. It is not fair to presume that he had stayed away to prevent him doing what he had already given him every facility for doing, especially when a better motive can be assigned, and with better reason for his conduct.

Mr. Bocock was aware that it was in the power of Mr. Johnson to change his will at pleasure as long as he lived, and retained testamentary capacity, and that the bequest to him was conditional, and that it was in the power of Mr. Johnson to render it valueless simply by giving orders on him, and that Mr. Johnson was aware of it. He knew also that the

disposition which he had made in his favor was known to his illegitimate children, and he had reason to believe would be made public; and that the numerous persons who would feel that they were interested to defeat it would have unrestrained access to Johnson, and would probably bring every influence they could against him. Yet it does not appear that he did anything to guard against these influences. He did not keep the disposition made in his favor concealed from Johnson's family, which would have been the most effectual, nor did he against those influences speak a word to Mr. Johnson by way of caution, or to restrain him from giving orders on him; but, on the contrary, told him that he would accept his orders payable when the money was collected, and which would be good after his death; and when he was informed by Mr. Thornhill that influences were brought to bear on the mind of Mr. Johnson to induce him to change this clause in his codicil, he wrote to him informing him that he had a perfect right to do so, and that his wishes should be carried out by him; and he furnished him with every facility he could to make any disposition he thought proper of the funds which were in his hands. In the conclusion of his letter he says: "As soon as my business is through I will be down;" but he never went to Mr. Johnson's house until after his death. He had a right to presume that after Mr. Johnson received his communications, if he wanted him he would let him know. He had given him all the legal advice and assistance by letter that he could if he were present. He preferred not to engage in a contest for a bequest of Mr. Johnson's property. He was willing to accept what he freely bequeathed him, but he was not willing to engage in a contest with the relations or with the illegitimate children for it. He chose therefore to surrender to them the whole field and to abide the result, without exposing himself to the imputation of going there to exert a personal influence over Mr. Johnson, to the prejudice of his blood relations and illegitimate children.

It has been held that a person may by fair argument and persuasion induce one to make a will in his favor. Jarman on Wills, pp. 38-39, and cases cited. And it is said by Mr. Perkins, in the 4th American edition of Jarman on Wills, to be the result of the cases, that "the influence to vitiate an act must amount to force and coercion, destroying free agency. It must not be the influence of affection and attachment, it must not be the mere desire for gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act." Jarman on Wills, 40, 41. Whether this be true or not, there is not an item of evidence in the record to show that Mr. Boccock, by any sort of intimidation or persuasion, influenced the testator to give him a benefit under his will, or that he even intimated a wish that he would do so. It is a fair presumption from the evidence, that the first intimation that he had ever had that the testator intended to make a testamentary disposition in his favor, was whilst he was engaged in taking a note of his instructions. And the intimation seems to have taken him by surprise. The testimony of Albert and Washington, reputed sons of the testator, who say they were present, or in hearing, when the instructions were given, and when the codicil was executed, is positive and unequivocal, to the effect that the dispositions made in the codicil were dictated and suggested by Johnson, and originated in his mind, and were written by Boccock according to his instructions, and fully corroborates the testimony of Thornhill.

If there was any sort of influence exerted by Mr. Boccock, to induce Mr. Johnson to give him so large a part, or any part of his estate, it does not appear in this record. On the contrary, the conclusion from the evidence, it seems to me, is irresistible, that the codicil expresses the real intentions of the testator, which were the suggestions of his own mind, and that it is the result of his free and unrestrained volition.

With regard to the question raised as to the competency of Albert Thornhill to testify in the cause, we think there is no error in the ruling of the circuit court. By express statute, he is not incompetent by reason of his being executor; and it does not appear that he had any such interest in the establishment of the codicil as would disqualify him as a subscribing witness. As to the ruling with regard to the competency of James H. Gooding, the joint deed of his wife and himself releasing her interest in the estate of Johnson, if she had an interest in that estate which would render her husband incompetent, it was thereby extinguished; and if she had not, no release was necessary to remove incompetency on that ground.

But they were plaintiffs in the suit, and liable for costs. The rule which excludes a party to the record as a witness in the cause applies to all cases where the party has any interest at stake in the suit, although it be only a liability for costs, and excludes a *prochein ami*, &c. *Murphy's Adm'r et al v. Carter et al.* 23 Gratt. 485. The deposition of the wife of a *prochein ami* cannot be read, as he is liable for costs. If one is incompetent to testify, the other is also. Chapter 172, §§ 21, 22, Code of 1873, rendering parties to civil suits competent to testify in their own behalf, by express terms does not apply to husband and wife. There is no error, therefore, we think, in the ruling of the circuit court, in excluding the testimony of James H. Gooding. Upon the whole, I am of opinion that there is no error in the decree of the circuit court, and that it should be affirmed.

The other judges concurred in the opinion of Anderson, J.

*Decree affirmed.*

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## SUPREME COURT OF MAINE.

(To appear in 54 Maine.)

### PROMISSORY NOTE. — BONA FIDE HOLDER.

#### ROBERTS v. JOHN LANE.

The defendant made and indorsed in blank a note, on six months, payable to his own order, which within a week was cashed by the bank of which the plaintiff was president, under his direction without further indorsement. Hearing afterward that the maker alleged fraud in the origin of the paper, and deeming himself negligent in not requiring a second indorser, the plaintiff took the note (long after its maturity) paying his bank the amount of it: *Held*, that he was a *bona fide* holder for value and entitled to recover without regard to any fraud in the inception of the paper, or any failure of consideration between the original parties.

The person who puts in suit a note shown to have been obtained from the maker by fraud, assumes the burden of establishing his own good faith. This he may do by showing that he, or any prior holder to whose rights he succeeds, has taken the note fairly for value before maturity in the due course of business, and without knowledge of the fraud, or notice of any circumstances of suspicion connected with the paper. It is immaterial what the plaintiff's knowledge may be, if any prior owner whose rights he has was a *bona fide* holder of the note as above explained.

It does not affect the principles of law above stated, that the note was made to the maker's order and bore only his indorsement, so that it passed by delivery, and the title was apparently derived directly from him, if it is shown that in fact it was purchased by the plaintiff's predecessor in title, in good faith, and for value, of him to whom the maker first gave it.

It is no defence to a note made and indorsed only by one and the same person, that the plaintiff bought it of a bank which is prohibited by the R. S. c. 47, § 14, from discounting paper without having at least two names to it. This provision is for the security of the stockholders, and does not concern him who obtains the loan upon it.

ASSUMPSIT upon a note dated February 15, 1871, for a thousand dollars, signed by the defendant and payable to his order in six months from its date, and indorsed by him in blank. No other name was upon it.

The defendant alleged that the note was obtained from him by the fraud of Smith and of Leavitt, so that neither of them could recover the amount if suit had been brought in the name of either of them.

The plaintiff asserts that he is a *bona fide* holder of the note, while the defendant denies it, and upon the determination of this issue the cause was to be decided upon the facts, which are sufficiently stated in the opinion, as well as the legal positions taken.

*Wilson & Woodard*, for the plaintiff.

*A. W. Paine*, for the defendant.

BARROWS, J. The defendant made a promissory note February 15, 1871, payable to his own order in six months from date, indorsed it in blank, and passed it, as we infer from the report of the evidence, in payment of his subscription for some worthless stock, and he claims that it was procured from him by fraud, in which Leavitt and Smith, the first known holders, were so far involved as to prevent them from sustaining an action upon it. But the plaintiff claims to be a *bona fide* holder; and if he is, judgment is to be rendered in his favor.

The evidence shows that within five days after the note was made, it was offered with others of like character, amounting in all to something over \$9,500, for discount at the Eastern Bank, Bangor. The plaintiff is president of that bank, and also of the Penobscot Savings Bank, which is a large depositor at the Eastern Bank. The cashier of the Eastern Bank, who was also treasurer of the savings bank, testifies that the Eastern Bank bought the note and paid Smith the amount of it, less the reasonable discount agreed upon, by a check on the Eliot National Bank of Boston, which was credited with the amount of the check February 20, 1871; that there was no private agreement or understanding with Smith, and no entry of the note upon the books of the Eastern Bank; that neither Smith nor Leavitt gave any reason for not indorsing the notes, nor were they asked to indorse them; that the cashier knew the law required two names, and it was not customary to discount without two; but that the bank had a surplus of money, the president liked the paper, and the cashier took it



and placed it in the drawer as cash ; that they took that course frequently to get interest for the Penobscot Savings Bank when it had a large amount on deposit in the Eastern Bank.

The defendant being called upon to pay the note to the Eastern Bank, refused, on the ground that it was obtained from him by fraud. The note lay in the bank drawer for a year, when the plaintiff, as he testifies, having heard what the talk was about the paper, but regarding it as the duty of the officers to see the bank harmless, and as there was negligence on his own part in not having the notes indorsed, gave his check for the amount paid by the bank, and took the note as his own.

As before stated, the question for determination is whether he is to be regarded as a *bonâ fide* holder under the circumstances here proved. The labored argument of the defendant's diligent counsel fails to induce us to indulge even a suspicion that at the time these officers of the Eastern Bank paid out the bank's money for this paper, they were aware of the taint in the inception of the notes, or even that there were any circumstances justly calculated to awaken suspicion in the facts attending the disposition of them by Leavitt and Smith. Nor does the evidence reported warrant the conclusion which the counsel seeks to draw from it, that this suit is prosecuted for the benefit of any party connected with the fraud. Unless we are to discredit the testimony given by the president and cashier, the only fair inference is that the notes were bought outright with the money of the Eastern Bank, where they were openly offered for discount so soon after they were made that it seems improbable that any suspicion as to their validity could have been excited in any quarter, and that at that time, at all events, the officers of the bank who conducted the transaction had no such suspicion, nor any cause for such suspicion, but relied with entire confidence upon the names of the makers for their payment at maturity without question or cavil.

It is equally certain that at the time when the plaintiff took the note in suit from the bank and paid his own money for it, it was overdue and dishonored, and he had knowledge that the payment would be contested on the ground of alleged fraud.

Upon this view of the facts, what are the legal rights and liabilities of the parties respectively ?

The defendant's allegation of fraud in the inception of the note does not seem to be traversed, and the result is that the burden of proof is on the plaintiff to show that he has the rights of a *bonâ fide* indorsee. *Perrin v. Noyes*, 39 Maine, 384 ; *Aldrich v. Warren*, 16 Maine, 465 ; *Munroe v. Cooper*, 5 Pick. 412 ; *Peacock v. Rhodes*, Doug. 633 ; *Heath v. Sansom et al.* 2 B. & Adol. 291 ; 22 E. C. L. R. 78.

A plaintiff may do this by showing that he himself, or any prior holder whose rights he has, came by the note fairly for value before maturity without knowledge of the fraud in the due course of business unattended with any circumstances justly calculated to awaken suspicion. In the class of cases above cited, and in others where similar language is used, the facts were such that it was obligatory upon the plaintiff to show such a transfer to himself, no previous holder having acquired the paper in that manner.

But it is equally well settled that if any intermediate holder between

the plaintiff and defendant took the note under such circumstances as would entitle him to recover against the defendant, the plaintiff will have the same right, even though he may have purchased when the note was overdue or with a knowledge of its infirmity as between the original parties.

In *Hascall et al. v. Whitmore*, 19 Maine, 102, the payee had put the note in circulation in fraud of his agreement not to part with it, and it appeared that it was utterly without consideration, and that one of the plaintiffs was informed of these facts before he purchased, but it was held that the plaintiffs could nevertheless recover, because a prior holder having a perfect title could transfer one. Shepley, J., says: "If the relations between himself and the maker only were to be considered he could not recover. But purchasing of one who had no notice, he must be considered to be in the same situation, and is entitled to the same protection." See also *Smith v. Hiscock*, 14 Maine, 449; *Woodman v. Churchill*, 52 Maine, 58.

It follows that the fact that Roberts took the note from the bank when it was overdue, and with knowledge that its validity would be contested, is of no importance if it had once been in the hands of an innocent holder for value without notice.

The defendant, Lane, made this note payable to his own order and indorsed it in blank, thus making it payable to bearer and transferable like a bank bill by mere delivery. *Peacock v. Rhodes*, Doug. 633. In this condition he placed it in the hands of those who have abused his confidence; but if thereby he enabled them to get the money on it from those who, ignorant of the equities between him and the holders of the note, relied on his written promise as equivalent to cash, it would be in accordance with fundamental law and justice, as well as with the custom of merchants, that he, and not the innocent purchaser, should bear the loss. When Leavitt and Smith directly after the inception sold the note and got the money, they parted with their property in it, and Lane became liable to pay it to the party who might lawfully be the bearer. Nor do we perceive that it makes any difference, under the facts here developed, whether that party was the bank, or the plaintiff, its financial agent, having control of its funds. If, by reason of any incapacity in the bank to take on account of the prohibition in the statute, the property in the note did not pass to the bank, then the plaintiff who directed the purchase must be deemed from that time the bearer of the note, and responsible to the bank for the use of its funds to make the purchase, and it is not for the promisor to object that the purchase was made with money wrongfully obtained. That was a matter which concerned only the bank, whose trustee and financial agent the plaintiff was.

But we think the bank did become the owner of the note, and rightfully entitled to collect or transfer it, when it was delivered by Leavitt and Smith to the officers of the bank in exchange for the money of the bank.

We do not think that any of the directions and restrictions contained in R. S. c. 47, § 14, relative to banks and banking, designed for the protection of their stock and bill holders and depositors, should be so construed as to operate adversely to their interests, and to relieve their debtors from

the performance of contracts not expressly made void by the statute, and especially contracts which include no illegal element in their essence or obligation.

We find no authority for such a construction. It is true there is a *dictum* to that effect in *Richmond Bank v. Robinson*, 42 Maine, 589. But it seems to us that the *dictum* is opposed to the decision. Robinson claimed to be relieved in a suit brought by the bank upon a note signed by him payable to Foster and Spaulding, and indorsed by the firm to the bank because Foster, who was a director in the bank, was at the time of the transaction liable to the bank to an amount exceeding eight per cent. of its capital stock.

This is prohibited in the same section, almost in the same breath with the discounting of paper, without at least two responsible names; but Robinson's claim to resist the suit of the bank because its title to the note accrued by the violation of one of these restrictions was overruled, we think rightly, upon the ground that while such violation might make the directors individually responsible to the bank in case of loss, or might make the bank liable to injunction at the instance of the state, still "the defendant cannot avail himself of this failure on their part to observe these requirements of the statute; as to him that violation was entirely collateral; it did not enter into or affect his contract."

The *dictum* seems to be based upon *Springfield Bank v. Merrick*, 14 Mass. 322, without noticing the important distinction that in that case the promise and undertaking in the contract itself was to do an act which was prohibited by law, *i. e.* to pay in a forbidden currency.

Of course we agree that the law will not lend its aid to compel a man to do that which is forbidden by statute. But there is no law against a man's paying the promissory note which he has made payable to bearer in lawful money, and the violation of law by the plaintiff's agents is entirely collateral.

So in *Western Bank v. Mills*, 7 Cush. 539, the contract itself in its stipulations was illegal, usurious, and specially declared void by statute.

In short, we think the decision in *Richmond Bank v. Robinson* overrules the *dictum* in the opinion, and is in substance and effect adverse to the position assumed by the defendant. The principles involved and the suggestions made in *Little v. O'Brien*, 9 Mass. 423, are applicable to the present case in more than one particular.

There a corporation, in direct violation of a duty imposed by its charter, had received the note sued indorsed in blank by the payee, and the officers of the corporation, without any legal corporate action thereon, had transferred it to the plaintiff by delivery merely. Yet the plaintiff was held entitled to recover.

The defendant here objects that there was no vote of the directors of the bank authorizing the transfer of the note in suit to the plaintiff.

But we think that is a matter between the bank and its officers, of which the defendant cannot avail himself. After such action as here appears by the agents of the bank intrusted with the care and management of its property and notes, it is clear that the bank could not be heard to assert a claim upon this note against the defendant, and it is in the power of the plaintiff to give him a good and legal discharge.

The defendant incurred his loss when he permitted his note payable to the bearer thereof to go into the market and be sold to those who took it in good faith for a full consideration without notice of the equities between him and the first holders, or reasonable grounds to suspect that it had been procured by fraud.

*Judgment for plaintiff.*

APPLETON, C. J., CUTTING, WALTON, and DANFORTH, JJ., concurred. PETERS, J., did not sit in this case.

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### CIRCUIT COURT OF THE CITY OF RICHMOND, VIRGINIA.

OF THE RIGHTS OF EMPLOYEES OF DEFAULTING RAILROAD COMPANY. —  
ARREARAGES DUE EMPLOYEES. — FORECLOSURE OF MORTGAGE, ETC.

DUNCAN *et al.*, TRUSTEES, *v.* CHESAPEAKE AND OHIO RAILROAD COMPANY.

The employees of a defaulting railroad company are not to be regarded as creditors at large in respect of their claims for wages in arrears at the time of the appointment of a receiver for the company.

When mortgagees come into a court of equity seeking satisfaction of their claims against a railroad company by suit for foreclosure, they should be required to satisfy all arrearages of pay due employees out of the trust property or its future earnings.

THIS was a cause in equity which came up on motion and was heard at the February term, 1876, of the circuit court of the city of Richmond, on the report of the Hon. William C. Wickham, receiver, asking the instructions of the court as to the disposition of the surplus earnings of the railroad, and requesting to be allowed to discharge the arrears of pay due employees prior to his appointment as receiver.

Messrs. *William J. Robertson, H. T. Wickham & W. H. Hogeman*, for the receiver, in support of the motion.

Messrs. *James Lyons & James Alfred Jones*, *contra*.

Messrs. *Shipman, Barlow, Larocque & MacFarland*, for complainants, assented to motion.

WELLFORD, Circuit Judge. Under orders heretofore entered in this cause, the court, in the interest of the creditors, has assumed control and administration, through its receiver, of all the franchises and property of the Chesapeake and Ohio Railroad Company. That company was successor to the Virginia Central Railroad Company, and in succeeding to all its franchises and rights of property, assumed all of its outstanding obligations.

It is admitted that these franchises and property, thus acquired *cum onere*, are abundantly sufficient to satisfy the creditors of the Virginia Central Railroad Company, and their claims are conceded to be paramount to those of any claimants under obligations of the Chesapeake and Ohio Railroad Company.

There appears to be no doubt that their claims will be paid to the full

extent of principal and interest out of the property now under the control of the court.

These creditors have patiently forborne to press their rights, and being now entitled to payment of arrears of several instalments of interest, and some of them to payment of principal, may properly expect every reasonable consideration in the disbursement of any funds subject to the order of the court, as far as may be practicable, towards the satisfaction of their claims. But unhappily for all parties to this cause, the immediate satisfaction of the most meritorious claims is altogether impracticable. My province is simply to determine how far it is practicable under the circumstances, and so far to order that it shall be made.

The creditors of the Virginia Central Railroad Company, as well as all the creditors of the Chesapeake and Ohio Railroad Company, who are practically interested just now in any orders of this court, claim under obligations of those companies secured by several deeds of trust executed by the respective companies, conveying in very comprehensive terms all corporate franchises and rights of property. These deeds were frequently in common parlance, and are sometimes in these proceedings styled mortgages, and I shall accept the phraseology notwithstanding its inaccuracy.

It was a substantial part of all these mortgages that the custody, control, and administration of the trust property should be left undisturbed in the hands of the railroad company, not merely until default in the terms of their covenants, but thereafter, until, in the intelligent discretion of the trustees, or upon the command of a large fractional representation of the bondholders, or in the judgment of a court of competent jurisdiction, such custody should be changed.

The character of the security offered for the investments asked by the corporation in placing its bonds upon the market made this provision of the mortgages a most essential element of the contract. Each mortgage contemplated an indefinite number of *cestuis que trust*, varying in amount of interest, and subject as to persons and amount to all the fluctuations of the money market. The security tendered was not to be measured in its value by the probable result of any every day sale under the hammer of the auctioneer. The great value of the security consisted in the importance of the franchise, and the providence with which the money contributed for its development should be appropriated to the construction of a great inter-state highway, the accumulation of all necessary material for transportation of persons and property, and an economical and energetic prosecution of the work. The corporation was engaged in a great experiment, and upon the success of that experiment necessarily depended, to a great extent, the value of all its obligations. But it was a corporation based upon solid and substantial investments, to which millions of money had been contributed by the commonwealth and several of the counties of Virginia, and many individual citizens of Virginia and her sister states.

The value of all this investment of capital was at stake, and made subordinate by the mortgages to the value of the bonds. The guaranty of the intelligent and watchful self-interest of the stockholders, to insure the success of the experiment, was therefore no inconsiderable element in the security of the bondholder.

It was not unreasonable to suppose that they would see to it that the

administration of the road would be confided to officers of intelligence, capacity, and providence, and that those officers, selected by the stockholders to protect their interests, would be not unsafe protectors of the paramount interest of the bondholders. The laws of the commonwealth required the periodical selection of these officers, gave to every stockholder a voice in such selection, and measured the value of his voice in proportion to the value of his interest by a prescribed rule. But after their election, during their continuance in office in the interest of the great mass of the stockholders, the law protected them in the intelligent discharge of their responsible trusts from the interference of any inconsiderable fraction of the individual stockholders. It was in like manner, in all these mortgages, deemed necessary, in the interest of the great mass of the bondholders, to protect these officers against unnecessary and improvident interruption by a few impatient or capricious bondholders. For the protection of the bondholders, gentlemen of intelligence, position, and character were designated in each mortgage as trustees, and large powers, to be exercised in their discretion for the benefit of the *cestuis que trust*, were conferred upon them. But that discretion was not left unlimited. Equally in the interest of the company as in that of the mass of the beneficiaries, the power to require the trustees, after default of the company, to enforce the trust, was studiously withheld from any single beneficiary, or any inconsiderable number of the beneficiaries. Power was conferred upon the trustees in some of the deeds to act after default according to their own discretion, to the extent of selling the trust property; but no such sale could be made without advertisement for such length of time in advance, as would give full opportunity to any and all parties in interest to invoke the interference of a court of equity, and enforce the execution of the trust in subordination to its decrees.

In none of the deeds, however, was power given to the trustees, in advance of sale, to divest the control of the officers of the company at their own independent election. Such power was given in several of the deeds, certainly in that under which the complainants claim, but only in the contingency that the trustees should be so required by a prescribed number in interest of the beneficiaries.

Until the administration of the trust property was assumed by this court through its receiver, none of the trustees in the exercise of their discretion, or in obedience to the command of the requisite number of *cestuis que trust*, ever suggested, in the discharge of their trust, the propriety of dispossessing the constituted officers of the company. The receiver of this court, under the orders of this court, acquired possession of the trust property only from those constituted officers.

All of these mortgages, it will be observed, invited the investment of capital upon faith in the security of an uncompleted railroad, and every purchase of a bond involved upon the part of the purchaser a like confidence, to a certain extent, with that which the state in conferring the franchise, and the stockholder in investing his money, reposed in the executive officers of the company for the faithful and energetic discharge of the duties assigned to them by the fundamental law of the corporation. That duty involved the prosecution to a successful completion of the projected railroad, and as rapidly as it could be completed even partially, the

administration and conduct of any completed parts as common carriers of persons and property, under all the obligations as such to the state and the public. In consideration of their paramount interest, the bondholders were invited to confide, and by their acceptance did confide, to the stockholders the selection of these officers — until after default of the company they might elect to enforce the trusts of the deeds.

In the mean time these officers, in the common interest of stockholder and bondholder, were charged with their grave responsibilities. To meet them, the subscriptions of stock having been exhausted, they could have, in contemplation of all parties, no possible means except the earnings of the road and the credit of the company, so far as it might with recorded notice of the liens of the bondholders be at all available.

Prior to any default of the company in the payment of interest upon the bonds, it was not unreasonable to suppose that the credit of the company might be available with its officers for this purpose. But immediately upon default, publicity of the embarrassment of its finances was unavoidable, and after that default had continued a few months, the company became simply a tenant at the will of the bondholders of all its corporate franchises and property. Thereafter the credit of the company could certainly not have been contemplated as adequate to the necessities of the officers in charge in maintaining and preserving the value of the trust property.

What, then, had they to rely upon? Under the letter of the contract, upon nothing but the earnings of the road so long as it might be permitted to remain in their hands. But it certainly ought to have been contemplated, in making the contract, that this might prove to be an insufficient reliance. The earnings of the road were necessarily subject to the vicissitudes of trade and travel, and dependent upon the continued preservation, in despite of all accidents, of the continuity of its road and the regularity of its trains, and upon the confidence of the public in the providence and watchfulness of the officers charged with the control and management of the road in insuring all necessary and available safeguards against accident to life, limb, or property.

That providence and watchfulness necessarily required the continual outlay of large sums of money in daily expenditures for purchase of material of every description and provision for anticipated emergencies all along its four hundred and twenty miles of track. It imposed the necessity of the employment of a small army of subordinates all along its roadway and in control of every moving train, to be controlled and directed by skilled and intelligent overseers. The laws of humanity, the police laws of two states, overriding all questions of pecuniary interest in stockholders or bondholders, forbade the relaxation of that providence and vigilance, whatever it might cost, for one instant of time.

These necessary supplies could not be purchased by the pound or the piecemeal from day to day. This army of employees could not be paid all along the roadway with the setting of every sun. Those who furnished the one were compelled to await the ordinary routine of auditing and settling the account, incident to every business of magnitude, and the employees had to await the arrival of some periodic pay-day. If the officers in charge of this road were under obligation to announce, upon

offering to make every purchase and in engaging the services of every such necessary subordinate, that pay for such purchase or labor was to be forfeited at any moment when the bondholders might elect to arrest their administration of the road, it would have been manifestly impracticable to continue the operations of the road with any safety to the public for one single day after the right of the bondholders to take possession of the road had been consummate.

Were they under any such obligation? The contract did not command them to surrender possession to the trustees until required. They had no right of their own election, without the orders of the stockholders who had placed them in charge, to do so. Their duty under the law to the stockholders, and their duty under the contract to the bondholders, required them to retain possession. But if they were under any such obligation, it necessarily involved the impossibility of their continuing to conduct the road, and the unavoidable and immediate suspension of all trade and travel along its track. To say nothing here of the breach of faith to the commonwealth which conferred the franchise, and the great inconvenience to the public in whose interest the franchise was granted, such a suspension would have necessarily impaired immensely the value of the security of all the bondholders.

It appears from the record of this case that the officers of the Chesapeake and Ohio Railroad Company were placed in this dilemma. There is certainly nothing now before me which requires any censure of their conduct under these embarrassing circumstances. I have only occasion to consider that matter, however, so far as it may affect the rights of those who dealt with them under these circumstances, as the representatives of all parties interested in the franchises and property.

There can be no difficulty in rejecting any claim upon the funds under control of the court, preferred by any parties who can properly be regarded as creditors at large of the Chesapeake and Ohio Railroad Company, however meritorious the consideration upon which their claims against the said company may be based. Even if there be material furnished by any such creditors now in the daily use of the receiver, if such material were furnished on the credit of the company, any claim on account thereof must, in the absence of any lien retained by the special contract or reserved by the law, be subordinate to the recorded lien of the mortgages.

But can the claims of the employees of the company for arrearages of pay, or the comparatively small class of claimants referred to in the third clause of the receiver's report No. 1, be properly regarded in this suit as claims of creditors at large of the Chesapeake and Ohio Railroad Company?

I am not required to consider how these claims should be regarded if this were an application by the claimants to arrest the action of the trustees, or any of them, under the powers granted by their several deeds. This matter presents itself as incidental in the enforcement by a court of equity of the equitable rights of the bondholders under one of the deeds. So far as they are concerned, they have voluntarily subjected themselves to the enforcement of all equitable principles in the administration of the property under control of the court. The beneficiaries under the second



mortgage of the Chesapeake and Ohio Railroad Company being subordinate in interest to them, must, I take it, necessarily bear the ill consequences, if any, of the fundamental rule of this court, invoked by the complainants, that he who asks equity must do equity.

I incline to the opinion that the beneficiaries under all the Virginia Central Railroad mortgages, though superior in dignity to those represented by the complainants, are in this suit amenable to the same rule. But it is unnecessary to consider that question. It is conceded on all hands that the claims of these creditors are paramount, and that payment in full of principal and interest will be made to them; and as the allowance of the claims under consideration—confessedly of a high equitable character—can only postpone the realization of their full rights, they must, under familiar principles governing all proceedings of courts of equity, submit to the delay.

I am of opinion that these unpaid employees and other claimants referred to cannot be regarded as creditors at large of the Chesapeake and Ohio Railroad Company. If it can be said that they extended credit at all, it was credit not to the Chesapeake and Ohio Railroad Company, but to the officers then in charge of its franchises, rights of property, &c. The Chesapeake and Ohio Railroad Company had been then so long in default that the right of the bondholders to claim possession was fully consummate, and this was a matter of common notoriety. It could not be expected that the employees all along the track of this road should pause amidst their unceasing round of daily duty, to inquire whether the bondholders had or had not asserted their rights and assumed control. It was enough for them to know that the service they were rendering was such service as any proprietor would necessarily require, and they had a right to believe that the officers left in notorious occupancy of the property, and charged before the public with the responsibility of its care and custody, were abundantly authorized to act for all whom it might concern in contracting for their services.

The same principle will run through all the gradations of employment in this great corporation. These employees of every grade and dignity had every right to believe, that so long as the bondholders stood aloof without asserting their rights to possession, they were willing to accept and regard *pro tanto* as their agents for the preservation and protection of the property, the officers who, placed in charge thereof by their defaulting debtor, could not in good faith to the creditor or the debtor abandon their posts, or be derelict, while they held them, to the trusts which they imposed.

These bondholders are now in a court of equity seeking satisfaction of their claims against the railroad company. They have a right to be satisfied to the extent of an entire forfeiture of all the proprietary rights of the company; but to concede to them, in enforcing such forfeiture, a right to repudiate all responsibility to satisfy these highly meritorious claims of employees, &c., out of the property or its future earnings, would be grossly inconsistent with plain equity. In this forum they must be held to be estopped from denying the authority of the officers of the company under the circumstances, as agents for themselves as well as other parties in interest, to have incurred such liability.

A recent decision of the court of appeals of Kentucky, in a somewhat similar case, of *Douglas, &c. v. Cline, &c.*, of which I have been furnished by counsel with a newspaper report, fully sustain these views.

It seems to me, therefore, very clear that these claims must be recognized as properly chargeable upon the trust fund. The complainants and the defendants, trustees under the seven per cent. mortgage of the Chesapeake and Ohio Railroad Company, concur with the receiver in advising the payment of these claims. The holders of bonds secured under the mortgages of the Chesapeake and Ohio Railroad Company, all of whom they represent, are the only parties who can be ultimately affected by such payment; and I am happy to have their assent to the entry of an order which, in despite of all their opposition, must have been entered, authorizing and requiring the receiver, as promptly as practicable, to satisfy these claims.<sup>1</sup>

<sup>1</sup> The decree of the court was as follows: VIRGINIA: In the circuit court of the city of Richmond, March 22, 1876: *William Butler Duncan and Philo C. Colhoun, trustees, v. The Chesapeake and Ohio Railroad Company, the Board of Public Works of the State of Virginia et al.* This cause came on to-day to be further heard upon the papers formerly filed and the proceedings and orders formerly had and entered therein, and was argued by counsel. Now on consideration the court is of opinion, for reasons assigned in writing and ordered to be made a part of the record of this case, that the amounts due for services rendered by the operatives and employees of the Chesapeake and Ohio Railroad Company prior to October 1, 1875, as set forth in the aforesaid report of the receiver marked No. 1, is a proper and just charge on the surplus earnings of the railroad of said company, accrued and accruing in the hands of the receiver after defraying the expenses and costs of operating and maintaining said railroad, and such other charges and payments as he has been heretofore or may hereafter be authorized to incur and make under orders herein, and the costs of this suit; it is therefore adjudged, ordered, and decreed that the said receiver is hereby authorized to apply, from time to time as they may accrue, such surplus earnings of said railroad to the liquidation of the sums due on account of services rendered by the operatives and employees of said company, commencing as far as practicable with the earliest of such claims. In making any payments under this provision of this decree, the receiver is authorized to exercise a reasonable discretion, and to give preference to the persons actually

employed in the service of said railroad company at the time of payment.

And the court being further of opinion that the amounts due on the matters mentioned in the third paragraph of said receiver's report No. 1, under the circumstances set forth in the said report, also constitute a just and proper charge on the like surplus earnings mentioned in the preceding paragraph of this decree, it is therefore further adjudged, ordered, and decreed that said receiver is hereby authorized, out of such surplus, to pay the amounts due therefor to the parties entitled thereto, at such times as to him may seem best.

And the court being further of opinion that, after paying the amounts hereinbefore directed to be paid, the residue of the like surplus earnings accruing to said receiver from the management of said railroad, should be applied as far as necessary, from time to time and as rapidly as such surplus will permit, in extinguishment of the accrued and accruing interest on the obligations which are recognized by all the parties to this cause, and which are known as the Virginia Central Railroad bonds, also mentioned in said receiver's report No. 1, it is therefore adjudged, ordered, and decreed that the said receiver do apply, from time to time as they accrue and as far as necessary, the residue of said surplus earnings in extinguishment of the accrued interest on the said obligations known as the Virginia Central Railroad bonds; and that hereafter as the same matures, or as soon thereafter as said surplus earnings will permit, he shall, out of the like surplus, pay off the accruing interest on said bonds.

## SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1875.]

CONSTITUTIONAL LAW. — THE FIFTEENTH AMENDMENT AND THE "ENFORCEMENT ACT." — INSUFFICIENCY OF THE ACT TO EFFECTUATE THE OBJECTS OF THE AMENDMENT.

UNITED STATES v. REESE.

The Act of May 31, 1870 (16 Stats. at Large, 140), known as the "Enforcement Act," is so general in its provisions that it cannot be regarded as "appropriate legislation" for the effectuation of the purposes of the fifteenth amendment to the Constitution of the United States. It is to all intents and purposes inoperative.

In error to the circuit court of the United States for the District of Kentucky.

Mr. Chief Justice WAITE delivered the opinion of the court.

This case comes here by reason of a division of opinion between the judges of the circuit court in the District of Kentucky. It presents an indictment containing four counts, under sections 3 and 4 of the Act of May 31, 1870 (16 Stats. at Large, 140), against two of the inspectors of a municipal election in the State of Kentucky, for refusing to receive and count at such election the vote of William Garner, a citizen of the United States of African descent. All the questions presented by the certificate of division arose upon general demurrers to the several counts of the indictment.

In this court the United States abandon the first and third counts, and expressly waive the consideration of all claims not arising out of the enforcement of the fifteenth amendment of the Constitution.

After this concession, the principal question left for consideration is, whether the act under which the indictment is found can be made effective for the punishment of inspectors of elections who refuse to receive and count the votes of citizens of the United States, having all the qualifications of voters, because of their race, color, or previous condition of servitude.

If Congress has not declared an act done within a state to be a crime against the United States, the courts have no power to treat it as such. *U. S. v. Hudson*, 7 Cranch, 32. It is not claimed that there is any statute which can reach this case, unless it be the one in question.

Looking, then, to this statute, we find that its first section provides that all citizens of the United States, who are or shall be otherwise qualified by law to vote at any election, &c., shall be entitled and allowed to vote thereat, without distinction of race, color, or previous condition of servitude, any constitution, &c., of the state to the contrary notwithstanding. This simply declares a right without providing a punishment for its violation.

The second section provides for the punishment of any officer charged with the duty of furnishing to citizens an opportunity to perform any act which by the constitution or laws of any state is made a prerequisite, or

qualification of voting, who shall omit to give all citizens of the United States the same and equal opportunity to perform such prerequisite, and become qualified on account of the race, color, or previous condition of servitude of the applicant. This does not apply to or include the inspectors of an election, whose only duty it is to receive and count the votes of citizens designated by law as voters, who have already become qualified to vote at the election.

The third section is to the effect that whenever, by or under the constitution or laws of any state, &c., any act is or shall be required to be done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of such citizen to perform the act required to be done, "as aforesaid," shall, if it fail to be carried into execution by reason of the wrongful act or omission "aforesaid" of the person or officer charged with the duty of receiving, or permitting such performance, or offer to perform, or acting thereon, be deemed and held as a performance in law of such act; and the person so offering and failing as aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner, and to the same extent, as if he had in fact performed such act; and any judge, inspector, or other officer of election, whose duty it is to receive, count, &c., or give effect to the vote of any such citizen, who shall wrongfully refuse or omit to receive, count, &c., the vote of such citizen upon the presentation by him of his affidavit stating such offer, and the time and place thereof, and the name of the person or officer whose duty it was to act thereon, and that he was wrongfully prevented by such person or officer from performing such act, shall for every such offence forfeit and pay, &c.

The fourth section provides for the punishment of any person who shall by force, bribery, threats, intimidation, or other unlawful means, hinder, delay, &c., or shall combine with others to hinder, delay, prevent, or obstruct any citizen from doing any act required to be done to qualify him to vote, or from voting at any election.

The second count in the indictment is based upon the fourth section of this act, and the fourth upon the third section.

Rights and immunities created by or dependent upon the Constitution of the United States, can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected.

The fifteenth amendment does not confer the right of suffrage upon any one. It prevents the states, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another, on account of race, color, or previous condition of servitude. Before its adoption this could be done. It was as much within the power of a state to exclude citizens of the United States from voting on account of race, &c., as it was on account of age, property, or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment there was no constitutional guaranty against this discrimination. Now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right

which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise, on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by "appropriate legislation."

This leads us to inquire whether the act now under consideration is "appropriate legislation" for that purpose. The power of Congress to legislate at all upon the subject of voting at state elections rests upon this amendment. The effect of article 1, section 4, of the Constitution in respect to elections for senators and representatives is not now under consideration. It has not been contended, nor can it be, that the amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at state elections. It is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that Congress can interfere and provide for its punishment. If, therefore, the third and fourth sections of the act are beyond that limit, they are unauthorized.

The third section does not in express terms limit the offence of an inspector of elections, for which the punishment is provided, to a wrongful discrimination on account of race, &c. This is conceded, but it is urged, that when this section is construed with those which precede it, and to which, as is claimed, it refers, it is so limited. The argument is that the only wrongful act on the part of the officer whose duty it is to receive or permit the requisite qualification, which can dispense with actual qualification under the state laws, and substitute the prescribed affidavit therefor, is that mentioned and prohibited in section 2, to wit: discrimination on account of race, &c., and that consequently section 3 is confined in its operation to the same wrongful discrimination.

This is a penal statute and must be construed strictly; not so strictly, indeed, as to defeat the clear intention of Congress, but the words employed must be understood in the sense they were obviously used. *U. S. v. Wiltberger*, 5 Wheat. 85. If, taking the whole statute together, it is apparent that it was not the intention of Congress thus to limit the operation of the act, we cannot give it that effect.

The statute contemplates a most important change in the election laws. Previous to its adoption, the states, as a general rule, regulated in their own way all the details of all elections. They prescribed the qualifications of voters and the manner in which those offering to vote at an election should make known their qualifications to the officers in charge. This act interferes with this practice, and prescribes rules not provided by the laws of the states. It substitutes, under certain circumstances, performance wrongfully prevented for performance itself. If the elector makes and presents his affidavit in the form and to the effect prescribed, the inspectors are to treat this as the equivalent of the specified requirement of the state law. This is a radical change in the practice, and the statute which creates it should be explicit in its terms. Nothing should be left to construction if it can be avoided. The law ought not to be in such a condition that the elector may act upon one idea of its meaning and the inspector upon another.

The elector, under the provisions of the statute, is only required to

state in his affidavit that he has been wrongfully prevented by the officer from qualifying. There are no words of limitation in this part of the section. In a case like this, if an affidavit is in the language of the statute, it ought to be sufficient both for the voter and the inspector. Laws which prohibit the doing of things, and provide a punishment for their violation, should have no double meaning. A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath, and an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion. If this statute limits the wrongful act which will justify the affidavit to discrimination on account of race, &c., then a citizen who makes an affidavit that he has been wrongfully prevented by the officer, which is true in the ordinary sense of that term, subjects himself to indictment and trial, if not to conviction, because it is not true that he has been prevented by such a wrongful act as the statute contemplated; and if there is no such limitation, but any wrongful act of exclusion will justify the affidavit and give the right to vote without the actual performance of the prerequisite, then the inspector who rejects the vote because he reads the law in its limited sense and thinks it is confined to a wrongful discrimination on account of race, &c., subjects himself to prosecution, if not to punishment, because he has misconstrued the law. Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define, by statute, a new offence and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime.

But when we go beyond the third section and read the fourth we find there no words of limitation, or reference, even, that can be construed as manifesting any intention to confine its provisions to the terms of the fifteenth amendment. That section has for its object the punishment of all persons who, by force, bribery, &c., hinder, delay, &c., any person from qualifying or voting. In view of all these facts we feel compelled to say that in our opinion the language of the third and fourth sections does not confine their operation to unlawful discriminations on account of race, &c. If Congress had the power to provide generally for the punishment of those who unlawfully interfere to prevent the exercise of the elective franchise without regard to such discrimination, the language of these sections would be broad enough for that purpose.

It remains now to consider whether a statute, so general as this in its provisions, can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, &c.

There is no attempt in the sections now under consideration to provide specifically for such an offence. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which provides in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on

that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitations and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the states and the people.

To limit this statute in the manner now asked for, would be to make a new law, not to enforce an old one. This is no part of our duty.

We must, therefore, decide that Congress has not as yet provided by "appropriate legislation" for the punishment of the offence charged in the indictment, and that the circuit court properly sustained the demurrers and gave judgment for the defendants.

This makes it unnecessary to answer any of the other questions certified. Since the law which gives the presiding judge the casting vote in cases of division, and authorizes a judgment in accordance with his opinion (Rev. Stat. sec. 650), if we find that the judgment as rendered is correct, we need not do more than affirm. If, however, we reverse, all questions certified, which may be considered in the final determination of the case according to the opinion we express, should be answered.

The judgment of the circuit court is affirmed.

THE "ENFORCEMENT ACT." — CONSTRUCTION OF SECTION SIX. — OF THE INSUFFICIENCY OF INDICTMENTS THEREUNDER WHICH DO NOT CHARGE A CONSPIRACY TO HINDER OR PREVENT THE ENJOYMENT OF A RIGHT GRANTED OR SECURED BY THE CONSTITUTION OF THE UNITED STATES. — OF THE NATURE OF STATE AND UNITED STATES CITIZENSHIP, AND THE NATURE AND POWERS OF THE STATE AND GENERAL GOVERNMENTS.

UNITED STATES v. CRUIKSHANK.

IN error to the circuit court of the United States for the District of Louisiana.

Mr. Chief Justice WAITE delivered the opinion of the court.

This case comes here with a certificate by the judges of the circuit court for the District of Louisiana that they were divided in opinion upon a question which occurred at the hearing. It presents for our consideration an indictment containing sixteen counts, divided into two series of eight counts each, based upon section 6 of the Enforcement Act of May 31, 1870. That section is as follows: —

"That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court, — the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years — and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States." 16 Stats. at Large, 141.

The question certified arose upon a motion in arrest of judgment after a verdict of guilty, generally upon the whole sixteen counts, and is stated to be whether "the said sixteen counts of said indictment are severally good and sufficient in law, and contain charges of criminal matter indictable under the laws of the United States."

The general charge in the first eight counts is that of "banding," and in the second eight that of "conspiring" together to injure, oppress, threaten, and intimidate Levi Nelson and Alexander Tillman, citizens of the United States of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the Constitution and laws of the United States."

The offences provided for by the statute in question do not consist in the mere "banding" or "conspiring" of two or more persons together, but in their banding or conspiring with the intent, or for any of the purposes specified. To bring this case under the operation of the statute,



therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the Constitution or laws of the United States. If it does so appear the criminal matter charged has not been made indictable by any act of Congress.

We have in our political system a government of the United States and a government of each of the several states. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a state, but his rights of citizenship under one of these governments will be different from those he has under the other. *Slaughter-House Cases*, 16 Wall. 74.

Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government the people may confer upon it such powers as they choose. The government when so formed may, and when called upon should, exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction, but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose.

Experience made the fact known to the people of the United States, that they required a national government for national purposes. The separate governments of the separate states, bound together by the articles of confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the confederated states. For this reason the people of the United States, "in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty" to themselves and their posterity (Const. Preamble), ordained and established the government of the United States, and defined its powers by a Constitution, which they adopted as its fundamental law and made its rule of action.

The government thus established and defined is to some extent a government of the states in their political capacity. It is, also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the states, but beyond these powers it has no existence. It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly, or by implication, placed under its jurisdiction.

The people of the United States resident within any state are subject to two governments, one state and the other national, but there need be no conflict between the two. The powers which one possesses the other

does not. They are established for different purposes and have separate jurisdictions. Together they make one whole and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a state, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the state by the breach of peace in the assault. So, too, if one passes the counterfeited coin of the United States within a state, it may be an offence against the United States and the state; the United States, because it discredits the coin, and the state, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common or bring them into conflict with each other. It is the natural consequence of a citizenship which owes allegiance to two sovereignties and claims protection from both. The citizen cannot complain because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return he can demand protection from each within its own jurisdiction.

The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the states or the people. No rights can be acquired under the Constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the states.

We now proceed to an examination of the indictment, to ascertain whether the several rights, which it is alleged the defendants intended to interfere with, are such as had been in law and in fact granted or secured by the Constitution or laws of the United States.

The first and ninth counts state the intent of the defendants to have been to hinder and prevent the citizens named in the free exercise and enjoyment of their "lawful right and privilege, to peaceably assemble together with each other, and with other citizens of the United States, for a peaceful and lawful purpose." The right of the people peaceably to assemble for lawful purposes, existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 211, "from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the states to afford it protection. As no direct power over it was granted to Congress, it remains, according to the ruling in *Gibbons v. Ogden*, 9 Wheat. 203, subject to state jurisdiction. Only such existing rights were committed by

the people to the protection of Congress as came within the general scope of the authority granted to the national government.

The first amendment of the Constitution prohibits Congress from abridging "the right of the people to assemble and to petition the government for a redress of grievances." This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the state governments in respect to their own citizens, but to operate upon the national government alone. *Barron v. The City of Baltimore*, 7 Pet. 250; *Lessee of Livingston v. Moore*, 7 Pet. 551; *Fox v. Ohio*, 5 How. 434; *Smith v. Maryland*, 18 How. 76; *Withers v. Buckley*, 20 How. 90; *Pervear v. The Commonwealth*, 5 Wall. 479; *Twitchell v. The Commonwealth*, 7 Wall. 321; *Edwards v. Elliott*, 21 Wall. 557. It is now too late to question the correctness of this construction. As was said by the late Chief Justice, in *Twitchell v. The Commonwealth* (*supra*, p. 325), "the scope and application of these amendments are no longer subjects of discussion here." They left the authority of the states just where they found it, and added nothing to the already existing powers of the United States.

The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the states. There is where the power for that purpose was originally placed, and it has never been surrendered to the United States.

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs, and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence, as stated in the indictment, will be made out if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

The second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called in *The City of New York v. Miln*, 11 Pet. 139, the

"powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police," "not surrendered or restrained" by the Constitution of the United States.

The third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, "of their respective several lives and liberty of person without due process of law." This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the states, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose, rests alone with the states. It is no more the duty or within the power of the United States to punish for a conspiracy, to falsely imprison, or murder within a state, than it would be to punish for false imprisonment or murder itself.

The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property, without due process of law, but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in *Bank of Columbia v. Okely*, 4 Wheat. 244, it secures "the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the amendment.

The fourth and twelfth counts charge the intent to have been to prevent and hinder the citizens named, who were of African descent and persons of color, in "the free exercise and enjoyment of their several right and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time enacted, or ordained by the said State of Louisiana and by the United States; and then and there, at that time, being in force in the said State and District of Louisiana, aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed at and within said State and District of Louisiana by white persons, being citizens of said State of Louisiana and the United States, for the protection of the persons and property of said white citizens." There is no allegation that this was done because of the race or color of the persons conspired against. When stripped of its verbiage, the case as presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the state and of the United States.

The fourteenth amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws; but this pro-

vision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states, and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

No question arises under the Civil Rights Act of April 9, 1866 (14 Stats. at Large, 27), which is intended for the protection of citizens of the United States in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude, because, as has already been stated, it is nowhere alleged in these counts that the wrong contemplated against the rights of these citizens was on account of their race or color.

Another objection is made to these counts that they are too vague and uncertain. This will be considered hereafter in connection with the same objection to other counts.

The sixth and fourteenth counts state the intent of the defendants to have been to hinder and prevent the citizens named, being of African descent and colored, "in the free exercise and enjoyment of their several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the said State of Louisiana, or by the people of and in the parish of Grant aforesaid." In *Minor v. Happersett*, 21 Wall. 178, we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the states. In *U. S. v. Reese*, just decided, we hold that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship, but that exemption from discrimination in the exercise of that right on account of race, &c., is. The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been.

Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race, &c., it does not appear that it was their intent to interfere with any right granted or secured by the Constitution or laws of the United States. We may suspect that race was the cause of the hostility, but it is not so averred. This is material to a description of the substance of the offence, and cannot be supplied by implication. Everything essential must be charged positively, and not inferentially. The defect here is not in form but in substance.

The seventh and fifteenth counts are no better than the sixth and

fourteenth. The intent here charged is to put the parties named in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted "at an election before that time, had and held according to law by the people of the said State of Louisiana, in said state, to wit: on the 4th day of November, A. D. 1872, and at divers other elections by the people of the state, also before that time and held according to law." There is nothing to show that the elections voted at were any other than state elections, or that the conspiracy was formed on account of the race of the parties against whom the conspirators were to act. The charge as made is really of nothing more than a conspiracy to commit a breach of the peace within a state. Certainly it will not be claimed that the United States have the power or are required to do mere police duty in the states. If a state cannot protect itself against domestic violence, the United States may, upon the call of the executive, when the legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the Constitution (Art. 4, section 4), but it applies to no case like this.

We are, therefore, of the opinion that the first, second, third, fourth, sixth, seventh, ninth, tenth, eleventh, twelfth, fourteenth, and fifteenth counts do not contain charges of a criminal nature made indictable under the laws of the United States, and that consequently they are not good and sufficient in law. They do not show that it was the intent of the defendants, by their conspiracy, to hinder or prevent the enjoyment of any right granted or secured by the Constitution.

We come now to consider the fifth and thirteenth and the eighth and sixteenth counts, which may be brought together for that purpose. The intent charged in the fifth and thirteenth is "to hinder and prevent the parties in their respective free exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the United States and as citizens of said State of Louisiana," "for the reason that they, . . . being then and there citizens of said state and of the United States, were persons of African descent and race, and persons of color, and not white citizens thereof," and in the eighth and sixteenth, to hinder and prevent them "in their several and respective free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the Constitution and laws of the United States." The same general statement of the rights to be interfered with is found in the fifth and thirteenth counts.

According to the view we take of these counts the question is not whether it is enough, in general, to describe a statutory offence in the language of the statute, but whether the offence has here been described at all. The statute provides for the punishment of those who conspire "to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States." These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of "every, each, all, and singular" the rights granted them by the Constitution, &c. There is no specification of any particular right. The language is broad enough to cover all.

In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation." Amendment 6. In *U. S. v. Mills*, 7 Pet. 142, this was construed to mean that the indictment must set forth the offence "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;" and in *U. S. v. Cook*, 17 Wall. 174, that "every ingredient of which the offence is composed must be accurately and clearly alleged." It is an elementary principle of criminal pleading that where the definition of an offence, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition, but it must state the species — it must descend to particulars." 1 Arch. Cr. Pr. & Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.

It is a crime to steal goods and chattels, but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. So, too, it is in some states a crime for two or more persons to conspire to cheat and defraud another out of his property, but it has been held that an indictment for such an offence must contain allegations setting forth the means proposed to be used to accomplish the purpose. This, because, to make such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute, and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed in order that the court may see that they are in fact illegal. *State v. Parker*, 43 N. H. 83; *State v. Keach*, 40 Vt. 118; *Alderman v. The People*, 4 Mich. 414; *State v. Roberts*, 84 Maine, 82. In Maine it is an offence for two or more to conspire with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the state prison (*State v. Roberts*), but we think it will hardly be claimed that an indictment would be good under this statute, which charges the object of the conspiracy to have been "unlawfully and wickedly to commit each, every, all and singular the crimes punishable by imprisonment in the state prison." All crimes are not so punishable. Whether a particular crime be such an one or not is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defence by motion to quash, demurrer, or plea; and the court, that it may determine whether the facts will sustain the indictment. So here, the crime is made to consist in the unlawful combination with an intent to prevent

the enjoyment of any right granted or secured by the Constitution, &c. All rights are not so granted or secured. Whether one is so or not is a question of law to be decided by the court, not the prosecutor. Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear, that is to say, appear from the indictment without going further, that the acts charged will, if proven, support a conviction for the offence alleged.

But it is needless to pursue the argument further. The conclusion is irresistible that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them.

The order of the circuit court arresting the judgment upon the verdict is, therefore, affirmed, and the cause remanded with instructions to discharge the defendants.

## COURT OF APPEALS OF MARYLAND.

(To appear in 42 Maryland.)

**LIABILITY FOR INJURIES OCCASIONED BY UNSKILFULNESS OR NEGLIGENCE. — GRANT OF AUTHORITY BY LEGISLATURE TO RAILROAD COMPANY TO TUNNEL THE STREETS OF A CITY, MAY BE IMPLIED. — DIFFERENCE BETWEEN PUBLIC AND PRIVATE CORPORATIONS IN THEIR LIABILITY FOR INJURIES CAUSED BY DOING A LAWFUL ACT. — MEASURE OF DAMAGES. — PROXIMATE AND REMOTE CAUSE.**

### BALTIMORE AND POTOMAC RAILROAD COMPANY v. REANEY.

If a party by carelessness in making an excavation in his own ground causes the fall of, or injury to a house erected on the land adjoining, he is liable in damages for the injury.

If a party acting under lawful authority inflict injury in the manner of executing the authority, as by unskilfulness or negligence, he is liable for the consequences.

Authority by the legislature to a railroad company to tunnel the streets of a city may be granted by implication:

Damage done to the house of a party by reason of the excavation of a street by a railroad company made under lawful authority, is not *damnum absque injuria*, and he may recover therefor without showing that the power delegated to the company has been illegally or negligently exercised.

As against a municipal government in the careful exercise of its right and power to grade, change, and improve a street, there can be no right of action for any unavoidable injury done; but as against a private corporation in nowise connected with the municipal government, obtaining authority to use the streets in an extraordinary manner for its own private purposes and profit, the case is quite different.

As against such party the owner of a lot of ground with a building thereon, bounding on a street, is entitled to the natural support which the bed of the street may afford to the foundation of his house. And notwithstanding authority may have been obtained both from the city and the state legislature, to make the extraordinary use of the street, yet that authority must be exercised at the peril of the party to whom it is



delegated; and if any injury accrues to private property in the exercise of the power, the party producing it must be held liable. And such liability arises even though the injury is the natural or inevitable result or consequence of the act authorized to be done.

The owner of the corner house binding on the street excavated, being entitled to such support to the foundation of his building as the bed of the street afforded before it was excavated, if the adjoining house was bound to the corner house, and was lawfully dependent upon it for its stability, the disturbance of the natural support of the corner house by the act of the party making the excavation, whereby injury is done to the adjoining house, furnishes the owner of the latter a cause of action that entitled him to recover for such injury.

The measure of damages in such case would be a sum that would compensate the plaintiff for the injuries done to his particular interest in the premises.

Whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes, if those intervening causes were set in motion by the original wrong-doer.

APPEAL from the court of common pleas.

The facts of the case are sufficiently stated in the opinion of the court. The first exception was taken by the defendants to the granting by the court below of the second, third, and fourth prayers of the plaintiff. The second exception was taken by the defendants to the refusal by the court to grant their third and fifth prayers. The verdict and judgment being for the plaintiff, the defendants appealed.

The cause was argued before Bartol, C. J., Stewart, Miller, Alvey, and Robinson, JJ.

*William A. Fisher & Daniel Clarke*, for the appellants.

The right to enter the city of Baltimore, and construct its railroad within the limits of the city, was conferred by the legislature upon the Baltimore and Potomac R. R. Co. under its charter, and the amendments thereto. Act of 1853, ch. 194, secs. 12, 16, 22; Act of 1870, ch. 80, sec. 7; *Tenn. & Ala. R. R. Co. v. Adams*, 3 Head, 597; *Mohawk Bridge Company v. Utica & Schenectady R. R. Co.* 6 Paige, 554; *Smith v. Helmer*, 7 Barb. 416; *Mason v. Brooklyn City & New Town R. R. Co.* 85 Ib. 374.

The legislature had the power to authorize the building of the Baltimore and Potomac Railroad within the limits of the city of Baltimore, or upon a street or other public highway. *Tenn. & Ala. R. R. Co. v. Adams*, 3 Head R. 597; *Newbury Turnpike Co. v. Eastern R. R. Co.* 23 Pick. 326; *Drake v. Hudson River R. R. Co.* 7 Barb. 508; 4 B. & A. 30; *Philadelphia & Trenton R. R. Co.* 6 Whart. 43; *Mercer v. Pittsburg, Fort Wayne & Chicago R. R. Co.* 36 Penn. St. 99; *Broadway & Locust Point Ferry Co. v. Hankey*, 31 Md. 349; *People v. Kerr*, 37 Barb. 357.

The Mayor and City Council of Baltimore had the right to prescribe the manner in which the Baltimore and Potomac Railroad Company should construct its road through the streets of the city, and to provide for the mode of building it in a tunnel along its streets, as contained in the ordinance approved May 29, 1869. See Charter of Baltimore City, City Code, p. 12; Baltimore City Code, sec. 823; *Northern Central R. R. Co. v. Mayor, &c. of Baltimore*, 21 Md. 103.

The evidence shows that the city of Baltimore acquired title to Wilson Street, when the same was excavated, by condemnation for public use as a

street. And the grant of the use of its streets for the construction of a railroad in a tunnel was a proper exercise of power over the streets, and is authorized as a public use to which the street may be applied under the title acquired by condemnation. The grant, made by the ordinance, conferred the right as against the city, which otherwise the company could have only acquired by condemnation. *Plant v. Long Island R. R. Co.* 10 Barb. 26; *Adams v. Washington & Saratoga R. R. Co.* 11 Ib. 414; *Chapman v. Albany & Schenectady R. R. Co.* 10 Ib. 363; *Lexington & Ohio R. R. Co. v. Applegate*, 8 Dana, 309; 6 English R. R. Cases, 422; *Porter v. North Missouri R. R. Co.* 33 Missouri, 128; *Murphy v. City of Chicago*, 29 Illinois, 279.

But if any doubt could exist as to the power of the mayor and city council to pass the ordinance approved May 29, 1869, the legislature has ratified the ordinance, and the power exercised by the mayor and city council. *State, ex rel. Mayor, &c. of Balt. v. Kirkley*, 29 Md. 85, 105; *Mayor, &c. of Annapolis v. State*, 30 Ib. 112; Act of 1870, ch. 80, sec. 7.

The evidence showing that the excavation of Wilson Street was made under the power conferred by the legislature, and the Mayor and City Council of Baltimore, and that the ordinance required the excavation of Wilson Street, the plaintiff's second prayer improperly declared that he was entitled to recover upon the facts therein set forth.

If damage ensue to adjoining property *not taken*, from the exercise of power conferred by competent authority, then the damage is *damnum absque injuria*, and the party injured cannot recover for any damage sustained by reason of the exercise of the power, unless it can be shown that the power has been illegally, improperly, or negligently exercised. *Douglas v. Boonsborough Turnpike Road Co.* 22 Md. 219; *Tyson v. Commissioners of Baltimore Co.* 28 Ib. 510; *Houck v. Wachter*, 34 Ib. 265; *Corey v. Buffalo, Corning & New York R. R. Co.* 23 Barb. 482; *Porter v. North Missouri R. R. Co.* 33 Missouri, 128; *O'Connor v. Pittsburg*, 6 Harris, 189; *Green v. Borough of Reading*, 9 Watts, 384; *Monongahela Nav. Co. v. Cons*, 6 Watts & Serg. 101; *Henry v. Pittsburg & Alleghany Bridge Co.* 8 Ib. 86; *Hatch v. Vermont Central Railway*, 25 Vermont, 49; *New York & Erie R. R. Co. v. Young*, 33 Penn. St. 180; *Plant v. Long Island R. R. Co.* 10 Barb. 26.

The plaintiff's third prayer is objectionable, because, although it properly places the right to recover upon the fact of due care and diligence in the manner of excavating the street and constructing the work, yet it fails further to require the jury to find that the excavation of Wilson Street was the *proximate* cause of the injury, and does not submit to the jury to find upon the facts set forth in the defendant's third and fifth prayers as qualifying the plaintiff's right to recover.

There was evidence upon which to predicate the third and fifth prayers.

It is well settled that a party is not liable in damages for an act which is not the direct, immediate, and proximate cause of the damages sustained. 3 Parsons on Contracts, page 177, sec. 5.

The reason of the rule is plain, that if every one were answerable for *all* the consequences of his acts, no one could tell what his liabilities at any moment might be.

In the case of *Insurance Co. v. Tweed*, 7 Wallace, 44, the supreme court of the United States say, "The immediate cause of an act is that which happens without any intervening power to stand as the cause of the injury complained of." Another test is, "that a party shall be held liable for those consequences which might have been foreseen and expected as the result of the act, but not for those which he could not have foreseen or expected as the result of the act." Again, another inquiry bearing on the question whether the cause of damage was proximate or remote, is this, "Did the cause alleged produce its effect *without* another cause intervening, or was it made operative only through and by means of this intervening cause?" Parsons on Contracts, p. 180.

If the facts set forth in the third and fifth prayers of the defendants were found to be true by the jury, then the acts of the defendants were not the proximate cause of the damage sustained, and the plaintiff was not entitled to recover for any damage under the first count. *Pennsylvania R. R. Co. v. Kerr*, 62 Penn. St. 364; *Ryan v. New York Central R. R. Co.* 35 N. Y. R. 210; 2 Greenl. Ev. sec. 256; *Insurance Co. v. Tweed*, *supra*.

In this case the defendants excavated the street at a distance of nearly forty feet from the plaintiff's house. All the witnesses testified that the excavation *alone*, made at this distance from the plaintiff's house, would have caused no injury to the same. The excavation, without some *intervening cause*, would not have produced any damage. These intervening causes were several. The testimony further showed that if there had been no house on the corner, the excavation would not have caused any injury to the plaintiff's house. The testimony further showed that the plaintiff's house would not have cracked or inclined out of a plumb line, unless the adjoining house first settled or inclined from a plumb line.

Even this settling or inclination from a plumb line of the corner house would not have produced *any injury to the plaintiff's house*, but for the further fact that the houses were improperly joined or fastened together when constructed. This latter fact caused the corner house to have an intervening power for injury to the plaintiff's house, which it would not have possessed had the two houses been properly constructed, according to the testimony, *i. e.*, the corner house not attached to the other houses by a peculiar mode of construction which would cause all four houses to settle together.

The defendants should not be held liable for damages resulting along the entire row of houses from an improper mode of construction, which was unknown to them, and which they could not guard against. They should only be liable, if at all, for injuries resulting directly, and as the natural consequence of the excavation.

*George C. Maund & William A. Stewart*, for the appellee.

The plaintiff's second prayer was properly granted; it was based upon the third section of the ordinance approved 29th May, 1869, above referred to, which among other things contains the following: "The tunnel or tunnels mentioned and provided for in the preceding section shall be so constructed and arched as to leave uninjured and secure the streets under which said tunnels shall be made; and if in constructing the said railroad across or under any of the streets or alleys mentioned in this ordi-

nance it shall become necessary to take up any pavement on said streets, or excavate the same, then, and in that event, the said Baltimore and Potomac Railroad Company shall restore the surface of said streets to the same condition in which they were before," &c., &c.

This ordinance, it is admitted, was applied for and accepted by the company. If it granted rights to the company, surely the company are bound by the limitations which it prescribes. The rights can only be exercised subject to the limitations. In granting to the company the right to take up the pavement on any street, or excavate the same, it prescribes and limits the event in which it may be exercised, to wit: "*if it shall become necessary.*" Can it then be doubted that *this necessity* must exist before the right to excavate can arise? Otherwise of what avail is the ordinance? Can the company claim rights under it, and yet repudiate all of its restrictions? Indeed the defendants, by their first and second prayers (granted by the court), admit the *necessity of excavation* to be an element of their case, and assume the burden of proving it. These prayers of the defendants assume equally with the plaintiff (to which exception is taken), that the defendants were liable, unless the evidence showed that the excavation was necessary. The defendants cannot therefore be heard to complain of the court's action in granting the plaintiff's second prayer, as it simply affirms what is affirmed by their own prayers, which were granted.

But special exception is taken to the granting of the plaintiff's second prayer, "for the reason that there was *no evidence* in the cause that the defendants unnecessarily took up the pavement of Wilson Street and excavated the same." By this, of course, it must be meant, not that evidence upon this point was offered by *neither* party, but that no evidence of the sort was offered by the plaintiff. The record states that "the defendants further offered evidence, tending to show that it was necessary to excavate Wilson Street, at and near Madison Avenue, in the manner and to the depth to which the excavation was carried."

Now as the *right* to excavate depended in this case, according to the plain meaning of the language of the ordinance, upon the *necessity* for excavation, the burden of proving the necessity was upon the company. The question therefore, upon this appeal, is not the one which has been frequently decided by this court, as to whether a prayer was properly granted which was unsupported by any evidence. In fact the record shows there *was* evidence offered by the defendants, but the question is whether a prayer presented to the court by the plaintiff, and predicated upon such facts, must be rejected, merely because all the evidence with regard to those facts was offered by the defendants — the burden of proof being upon them? *Grove v. Brien*, 1 Md. 411; *Charleston Ins. Co. v. Corner*, 2 Gill, 426.

The plaintiff's fourth prayer regards the nature of his title to the property injured, as the lessee for a term of ninety-nine years, renewable forever, and correctly states the rule of damages. The jury are directed "by their verdict to give the plaintiff such sum as will compensate him for the injuries done to his said interest in said house." What other rule of damages could be properly prescribed by the court? See Sedgwick on Damages, 149; *Todd v. Jackson*, 2 Dutcher (N. J.), 525; *Dutro v. Wilson*, 4 Ohio St. 101.

The third and fifth prayers of the defendants were properly refused. The effort to apply the maxim, "*In jure non remota causa, sed proxima spectatur*," has given rise to much refined and subtle discussion; but among the many cases which have been decided, none can be found in which the alleged cause of injury has been held to be too remote, which is at all analogous to this. American Law Review for January, 1870, p. 201, &c.

In this case the proof shows the house of the plaintiff to have been so compactly attached to the corner house, that it was *physically impossible* for the walls of the one house to be thrown out of a plumb line without similarly affecting the other. If then the defendants, by their negligence, caused the foundation walls of the corner house to sink, the connection between their tortious act and the injury done to the walls of the plaintiff's house was not uncertain, vague, or indeterminate, or dependent upon some intermediate thing of an uncertain, vague, or indeterminate character; but the connection between the cause and the effect—between the injury done to the corner house and to the plaintiff's house—was *certain and necessary*. And the certainty and necessity of this connection was so obvious that the injury to the plaintiff's house consequent upon the injury to the corner house could not have been perceived in advance, not as a thing which *might* happen, but as a thing which *must happen inevitably*. *Marble v. City of Worcester*, 4 Gray, 412; *Davis v. Garrett*, 6 Bingh. 716; *Metallic Compression Casting Co. v. Fitchburg Railroad Co.* 109 Mass. 277; *Tisdale v. Inhabitants of Norton*, 8 Metc. 388; *Stordet v. Hall*, 4 Bingh. 607; *Powell v. Deveny*, 3 Cush. 300; *Ingalls v. Bills*, 9 Metc. 1; *Peters v. Warren Ins. Co.* 14 Peters, 108, 109, 110; *Livie v. Janson*, 12 East, 648; *Montoya v. London Assurance Co.* 6 Exch. 451; *Nelson v. Suffolk Ins. Co.* 8 Cush. 477; *Montgomery v. Firemen's Ins. Co.* 16 B. Monroe, 440; *Pennsylvania R. R. Co. v. Kerr*, 62 Penn. St. 364.

The city of Baltimore had no authority, under the general power vested in it, over streets, to pass the ordinance providing for the construction of the tunnel. *People's Railroad v. Memphis Railroad*, 10 Wallace, 51, 52; *Davis v. Mayor, &c. of New York*, 14 N. Y. 506, 515-517; *State of New York v. Mayor, &c. of City of N. Y.* 3 Duer, 119, 130, 144, 145; *Milbau v. Sharp*, 27 N. Y. 611, 618, 621; *Philadelphia & Trenton R. R. Co. v. Wharton*, 25, 44, 45; *Commonwealth v. Erie & North East R. R. Co.* 27 Penn. St. 351.

The Act of 1853, ch. 194, did not authorize the city to enact the ordinance. And the Act of 1870, ch. 80, did not operate as a ratification of the ordinance, because no terms of ratification, or purpose to ratify, appear in the act. *Morris & Essex R. R. Co. v. City of Newark*, 2 Stock. (N. J.) 352, 356, 363, 368, 369; *State, ex rel. Mayor, &c. of Balt. v. Kirkley et al.* 29 Md. 85.

In fact the ordinance, which does not in terms make its validity depend on subsequent ratification by the legislature, *cannot be ratified*. *Cooley on Const. Lim.* 369, 373, &c.; *State v. City of Newark*, 3 Dutch. 196, 197; *Schenley et ux. v. The Commonwealth*, 36 Penn. St. 57.

The defendants are liable for the kind of damage done to the property of the plaintiff, even if the ordinance be valid, and even if there were no

negligence in doing the work. 18 Wallace, 166-180. This case censures the extremes to which many courts have gone in applying the doctrine of *damnum absque injuria*. *Fletcher v. Auburn & Syracuse Railroad Co.* 25 Wend. 462; *Protzman v. Indianapolis & Cincinnati R. R.* 9 Ind. 467; *Evansville & Crawfordville Railroad Co. v. Dick*, 9 Ind. 433; *South Carolina Railroad Co. v. Steiner*, 44 Georgia, 546.

ALVEY, J., delivered the opinion of the court.

This was an action on the case instituted by the appellee, the plaintiff below, to recover of the appellants for injuries alleged to have been done to his house, by reason of the construction of a railroad tunnel by the appellants, under the bed of Wilson Street, in the city of Baltimore.

The house alleged to have been injured is situated on the southwest side of Madison Avenue, and adjoins the house on the corner of that avenue and Wilson Street, and stands twenty-four feet and four inches northwest of Wilson Street; the two houses being joined together by iron girders and other secure fastenings. These two houses, and two others, forming a row of four, were built by Ogle, the party from whom the appellee sub-leased; and at the time they were built their proprietor had no notice, nor reason to suppose, that Wilson Street had been, or would be, dedicated to the use of a railroad tunnel.

The injury alleged to have been done to the house, by the excavation of the street and the construction of the tunnel, was the weakening of the foundation, causing the walls to crack, and a settling out of plumb line.

Exception was taken at the trial below, by the appellants, to the granting of the second, third, and fourth prayers offered by the appellee, and to the refusal to grant the third and fifth prayers offered by the appellants. It is on these prayers that the questions arise to be decided upon this appeal.

1. By granting the appellee's second prayer, the jury were instructed, that if they believed from the evidence the appellants, in constructing the tunnel under Wilson Street, near the appellee's house, unnecessarily took up the pavement of said street, and excavated the same for the purpose of constructing the tunnel, and, by means of such excavation, damaged the appellee's house, by weakening its foundation and walls, and causing them to crack and break, then the appellee was entitled to recover.

To this instruction the appellants urge several objections. They insist that it is erroneous, because it entirely leaves out of consideration the authority under which they were acting in constructing the tunnel, and also omits all question of negligence in excavating the street, but makes the right to recover depend upon the fact, whether the appellants unnecessarily took up the pavement of the street, and excavated the same; thus making the liability of the appellants to depend on the necessity of doing an act which was authorized to be done by competent public authority. The instruction was also specially excepted to, upon the ground that there was no evidence in the cause from which the jury could find that the pavement of Wilson Street had been unnecessarily taken up, in making the excavation for the tunnel.

With respect to the question whether the pavement was unnecessarily taken up and the street excavated, the ordinance of the city provided that "the tunnel or tunnels mentioned and provided for in the preceding sec-

tion shall be so constructed and arched as to leave uninjured and secure the streets under which said tunnels shall be made; and if in constructing the said railroad across or under any of the streets or alleys mentioned in this ordinance it shall become necessary to take up any pavement on said streets, or excavate the same, then, and in that event," the appellants should restore the surface of the streets to the same condition in which they were before. Upon a proper construction of this ordinance, it is very questionable whether the liability of the appellants could be made to depend upon the degree of necessity that might exist for taking up the pavement and excavating the street in making the tunnel. Who is to determine the question of necessity, or the degree of necessity, that would justify the removal of the pavement, and the making the excavation, if not the appellants, to whom the authority was given so to construct their tunnel? But without deciding this question, we are clearly of opinion, upon a careful examination of the record, that there was no evidence upon which the jury could have found that there was no necessity for the removal of the pavement and the excavation of the street. The only evidence upon the subject was that offered by the appellants, which was to the effect that no proper care or precaution had been omitted in the construction of the tunnel at the particular point, purposely to avoid all injury to the houses mentioned. Indeed, the counsel for the appellee do not pretend that they offered any evidence whatever upon the subject, but they insist that, inasmuch as the appellants offered affirmative proof of the fact that all due care was taken, it was competent for the jury not only to discredit or disbelieve the witnesses, but to find a different or a reverse state of facts from that testified to by them, and that without any other evidence upon which to base such finding. The evidence upon this subject was all one way; and to infer that the pavement was unnecessarily removed from the simple fact that witnesses had testified that all proper care had been observed in executing the work, is a mode of reaching conclusions that cannot be indulged. It was the privilege of the jury to refuse credit to the appellants' witnesses; but while they might think proper to discard the testimony given by those witnesses, they could have no right to conclude as to a state of facts, to support which there was no evidence before them. Nor can we presume, for a moment, that the jury did so conclude; but, on the contrary, we should rather presume that they were governed by the unimpeached and uncontradicted evidence in the cause.

But with respect to the other objections to the instruction, that of ignoring reference to the authority under which the appellants were acting, and omitting all question of negligence in making the excavation for the tunnel, they present the question, whether the omissions in those particulars deprived the appellants of any valid defence to the appellee's claim to recover.

If there had been negligence in the execution of the work, resulting in the injury complained of, then, it is clear, the appellants would be liable; for the principle is well settled, that if a party, by carelessness in making an excavation in his own ground, causes the fall of, or injury to, a house erected on the land adjoining, he is liable in damages for the injury. *Dodd v. Holme*, 1 Ad. & Ell. 493; *Wyatt v. Harrison*, 3 B. & Adol. 876; *Humphries v. Brogdon*, 12 Q. B. 789. Or, if a party acting under law-

ful authority inflict injury, in the manner of executing the authority, as by unskillfulness or negligence, he is liable for the consequences. *Leader v. Moxon*, 3 Wilson, 461; *Jones v. Bird*, 5 B. & A. 837; *Lawrence v. Great North Railroad Co.* 16 Q. B. 653; *Manly v. St Helen's Canal & Railroad Co.* 2 H. & N. 840; Add. on Torts, 727.

In answer to the objection by the appellants to the instruction, that it omitted all reference to the authority under which the tunnel was made, it is contended by the counsel of the appellee that there was really no proper authority in the appellants to construct the tunnel under the streets of the city; and if they were right in this position, it would follow as a matter of course that the appellants could have no legal justification for any injury that may have resulted from the construction of that work. But we are of opinion that the appellants had ample authority to tunnel the streets, derived both from the city and state legislature. The appellants' original charter of 1853, chapter 194, manifestly did not contemplate the use of the streets of the city for the purposes of a tunnel; but the mayor and city council, by ordinance of the 29th of May, 1869, authorized such use, as far as they were competent, and prescribed the manner of its exercise. Whether the mayor and city council were competent to confer any such power in the use of the streets is a question that need not now be decided; as the legislature, by the Act of 1870, chapter 80, sanctioned and ratified the authority given by the city ordinance. It is true, this latter Act of 1870, being an amendment of the appellants' original charter, contains no express terms of ratification, but the terms used in the 7th section are equivalent to terms of express ratification. The authority given by the city to make the tunnel is recognized, and there is power given to charge additional freights and tolls for its use. This is a clear ratification, or grant of authority, at least by implication; and it is settled that such authority may be granted by implication. *Springfield v. Conn. Railroad Co.* 4 Cush. 63.

The appellants having authority to construct the tunnel, they contend that any damage that the appellee may have suffered to his house, by reason of the excavation of the street, is *damnum absque injuria*, and that no right of recovery exists unless it be shown that the power delegated to the appellants has been illegally or negligently exercised. To this, however, we do not assent.

In this case the jury have found that the property of the appellee has been damaged to the extent of three thousand dollars; and it would be a reproach to the law if the courts were required to determine that it was a case of *damnum absque injuria*, and that there was no redress for such a wrong. There is no reason why the appellee should be required to bear such a loss; it not being for any municipal benefit, but for the benefit of a private railroad corporation, with which he is no more concerned than any other individual of the state. If he could be required to bear this loss of three thousand dollars, he could and would be required to bear the loss, if it were to the full extent of the value of his property; and thus a party might have his house utterly destroyed, and yet be without a remedy to obtain redress. Such is not the state of the law, as applicable to a case like the present.

As against the municipal government, in the careful exercise of its right



and power to grade, change, and improve the street, there could be no cause of action for any unavoidable injury done; but as against the appellants, a private corporation in nowise connected with the municipal government, obtaining authority to use the streets in an extraordinary manner, for its own private purposes and profit, the case is quite different. As against such party, the owner of a plot of ground, with a building thereon, bounding on a street, is entitled to the natural support which the bed of the street may afford to the foundation of his house. And notwithstanding authority may have been obtained both from the city and state legislature to make the extraordinary use of the street, yet that authority must be exercised at the peril of the party to whom it is delegated; and if any injury accrues to private property in the exercise of the power, the party producing it must be held liable. If, as we have seen, the injury be produced by the careless or negligent exercise of the authority, then there can be no question of the liability; but if due care be exercised, and the injury is the natural or inevitable result or consequence of the doing the act authorized to be done, then, in a case like the present, the party doing the act and producing the injury must indemnify the sufferer. That there was no negligence or want of care in doing the work is no answer in a case like this. If the injury was the inevitable result of making the tunnel, then to the extent that the appellee's property was actually injured, it was substantially taken for the use of the appellants' road, and, of course, should be paid for. It is not to be assumed that either the city authorities or the legislature of the state intended that the authority delegated by them should be exercised irrespective of the rights of private property; and if it were clear that they did so intend, it is far from being certain that such a purpose could be accomplished. *Gardner v. Village of Newburg*, 2 Johns. Ch. 162; *Eaton v. Boston, Concord & Montreal Railroad Co.* 51 N. H. 504; *Pumpelly v. Green Bay Co.* 13 Wall. 166.

That the excavation of the street for the tunnel was lawful, and done in a lawful manner at the time, can constitute no defence to this action, if damages actually resulted from the work. There are many cases in which an act may be perfectly lawful in itself, and will continue to be so, until damage has been done to the property or person of another; but from the moment such damage arises the act becomes unlawful, and an action is maintainable for the injury. This is the case where a man sinks mines and makes excavations in his own land, doing no damage in the first instance to his neighbor, but subsequently causing his neighbor's land or his house to slide down into the excavation. *Bonomi v. Backhouse*, Ell., Bl. & Ell. 662; *Smith v. Thackerah*, L. R. 1 C. P. 564; Add. on Torts, 9.

The case of *Bonomi v. Backhouse*, just referred to, was an action for injuries to the plaintiff's house, suffered by reason of the working of neighboring mines by the defendant. It was not found that there was any negligence or improper working of the mines under the plaintiff's premises, or under the land immediately contiguous thereto, nor that any part of the damage to the plaintiff's property arose from such working; but that the damage arose solely by the defendant's working the mines in other lands not contiguous to the plaintiff's premises, at a distance of 280 yards from them; the earth intervening between the place worked and

the foundation of the house gradually giving way, and finally the effect reached the foundation of the house, and caused the injury thereto. The plaintiff was held to be entitled to recover, upon the fullest and most careful consideration, the case being finally decided in the exchequer chamber. And Mr. Justice Willes, in delivering the final judgment of the court, said: "The question in this case depends upon what is the character of the right; viz., whether the support must be afforded by the neighboring soil itself, or such a portion of it as would be beyond all question sufficient for present and future support, or whether it is competent for the owner to abstract the minerals without liability to an action unless and until actual damage is thereby caused to his neighbor. The most ordinary case of withdrawal of support is in town property, where persons buy small pieces of land, frequently by the yard or foot, and occupy the whole of it with buildings. They generally excavate for cellars, and in all cases make foundations; and, in lieu of support given to their neighbor's land by the natural soil, substitute a wall. We are not aware that it has ever been considered that the mere excavation of the land for this purpose gives a right of action to the adjoining owner and is itself an unlawful act, although it is certain that if damage ensued a right of action would accrue." And he further said that they were not aware that it had ever been supposed that the getting coal or minerals, to whatever extent, in a man's own land was an unlawful act, although, if he thereby caused damage to his neighbor, he was undoubtedly responsible for it. The right of action was supposed to arise from the damage, not from the act of the adjoining owner in his own land. And this same case decides, as is also decided in *Rowbotham v. Wilson*, 8 El. & B. 123, and in *Brown v. Robins*, 4 Hurl. & N. 186, 102, that the right of support to land from the adjoining soil is a right of property, and not an easement; and hence, if that support be impaired or withdrawn, and injury ensues, the absence of negligence is quite immaterial.

Now, in this case, the owner of the corner house was entitled to such support to the foundation of his building as the bed of the street afforded, before it was excavated for the tunnel — certainly as against the appellants, having no interest in the soil of the street. And if the appellee's house was bound to the corner house, and was lawfully dependent upon it for its stability, then the withdrawal or disturbance of the natural support of the corner house, by the act of the appellants, whereby injury was done to the house of the appellee, such act furnished the latter a cause of action that entitled him to recover for such injury.

And without discussing the question farther, we perceive nothing in the appellee's second prayer, which was granted, that in any manner prejudiced the lawful defences of the appellants, or which furnishes substantial ground for the reversal of the judgment.

It also follows, from what we have said, that the appellee's third prayer could not be objected to by the appellants. It made the right to recover to depend upon the finding of negligence in the construction of the tunnel, or the excavation of the street, — an element not essential to the appellee's right to recover. And as to the appellee's fourth prayer, that relates to the measure of damages proper to be allowed. The prayer would seem clearly to be correct, and we do not understand the counsel of the appel-

lants to make serious objection to it. The jury were instructed to give such damages only as would compensate the appellee for the injuries done to his particular interest in the premises. Nothing less than this would be fair compensation.

2. The appellants, by their third prayer, sought to have the jury instructed by the court below that unless the excavation of Wilson Street, in the construction of the tunnel, "*was the direct, immediate, and proximate cause of the injury*" to the appellee's house, the latter could not recover; and that upon the finding of certain facts, set out in the prayer, the excavation of the street did not constitute the direct, immediate, and proximate cause of the injury complained of, but that the giving way of the walls of the corner house, to which the house of the appellee was bound, was the direct, immediate, and proximate cause of the injury; and that such was the case, notwithstanding the giving way of the walls of the corner house, was the direct consequence of the excavation.

The appellants' fifth prayer presents substantially the same question, though in somewhat different form.

In the application of the maxim, *In jure non remota causa, sed proxima spectatur*, there is always more or less difficulty, and attempts are frequently made to introduce refinements that would not consist with principles of rational justice. The law is a practical science, and courts do not indulge refinements and subtleties, as to causation, that would defeat the claims of natural justice. They rather adopt the practical rule, that the efficient and predominating cause, in producing a given event or effect, though there may be subordinate and dependent causes in operation, must be looked to in determining the rights and liabilities of the parties concerned.

It is certainly true, that where two or more *independent* causes concur in producing an effect, and it cannot be determined which was the efficient and controlling cause, or whether, without the concurrence of both, the event would have happened at all, and a particular party is responsible for only the consequences of one of such causes, in such case a recovery cannot be had, because it cannot be judicially determined that the damage would have been done without such concurrence. *Marble v. City of Worcester*, 4 Gray, 395. But it is equally true that no wrong-doer ought to be allowed to apportion or qualify his own wrong; and that, as a loss has actually happened whilst his own wrongful act was in force and operation, he ought not to be permitted to set up as a defence that there was a more immediate cause of the loss, if that cause was put into operation by his own wrongful act. To entitle such party to exemption, he must show not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done. *Davis v. Garrett*, 6 Bing. 716.

Now, the argument in this case is, that if no house had been built on the corner, bounding on Wilson Street, the construction of the tunnel would not have affected the house of the appellee; and if his house had not been attached or bound to the corner house in the manner it was, the settling or inclination from a plumb line of the corner house would not have caused damage to the appellee's house; that the manner in which the two houses were bound or fastened together was not a proper mode

of construction. But in answer to this it may be said, that the houses were built before the construction of the tunnel, and that the proprietor was not required to conform to any particular plan or mode of building to meet and obviate the possible danger of such a use of the street. There was nothing illegal in the mode of structure, and as against the appellants, the appellee was entitled to have the house maintained as it was built. Moreover, it is not shown or pretended that the walls of the house would have cracked and broken, in the manner they are alleged to have done, but for the construction of the tunnel; and as we have seen, it is not that the damage may by possibility have happened, but it must appear that it would certainly have happened, without the agency of the cause complained of, in order to exonerate the party responsible for the effects produced by such cause.

The principle is well settled, that whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes, if those intervening causes were set in motion by the original wrong-doer. Add. on Torts, 5. This is clearly illustrated by the leading case of *Scott v. Shepherd*, Wilson, 403. There the defendant threw a lighted squib into the market-house, where persons were engaged in selling articles, and the squib fell upon a gingerbread stall, and the stall-keeper, to protect himself, threw the squib across the market-house, where it fell upon another stall, and was again thrown off and exploded near the plaintiff, and put out his eye. It was held, that the party who first threw the squib was responsible to the plaintiff for the injury, though it was urged that the plaintiff's eye was not put out by the immediate act of the defendant, but by the immediate act of the party who last threw off the squib. All the injury, said the chief justice, was done by the first act of the defendant. That, and all the intervening acts of throwing, were to be considered as one single act. So in the case of *Vandenbaugh v. Truax*, 4 Denio, 464, where the defendant, having had a quarrel with a boy in the street, took up a pickaxe, and pursued the boy, and the latter ran for safety into a wine-shop and upset a cask of wine, it was held that the defendant, the pursuer of the boy, was responsible in damages for the loss of the wine, notwithstanding it was upset by the boy. To these cases many more might be added, illustrative of the same general principle.

As will be observed, in the cases cited, the injuries complained of were immediately and directly produced by causes or agencies intermediate between the original wrong-doer and the sufferer, but those agencies were put in motion by the original wrong-doer, and hence he was liable. So in this case, if the making the excavation caused a disturbance of the foundation and a fracture of the walls of the corner house, whereby injury, by reason of the connection between the two houses, was done to the appellee's house, that injury must be imputed to the first cause, namely, the making the excavation.

This question of remote and proximate cause has been recently considered by this court, in the cases of *The Annapolis & Elkridge R. R. Co. v. Gantt*, 39 Md. 115, and *Phil. & Balt. R. Co. v. Constable*, 39 Ib. 149, and the decisions in those cases, though made in reference to a

different state of facts, would seem to be quite decisive of the question presented in this case.

Finding no error upon which the judgment should be reversed, we shall affirm the judgment.

*Judgment affirmed.*

## SUPREME COURT OF THE UNITED STATES.

### INVALIDITY OF STATE ENACTMENTS IMPOSING TAX ON MASTERS OF VESSELS LANDING FOREIGN PASSENGERS.

#### HENDERSON v. WICKHAM, MAYOR, ETC.

#### COMMISSIONERS OF IMMIGRATION v. THE NORTH GERMAN LLOYD.

1. The case of the *City of New York v. M'In*, 11 Peters, 103, decided no more than that the requirement from the master of a vessel of a catalogue of his passengers landed in the city, rendered to the mayor on oath, with a correct description of their names, ages, occupations, places of birth, and of last legal settlement, was a police regulation within the power of the state to enact, and not inconsistent with the Constitution of the United States.
2. The result of the *Passenger Cases*, 7 How. 283, was to hold that a tax demanded of the master or owner of the vessel for every such passenger was a regulation of commerce by the state, in conflict with the Constitution and laws of the United States, and, therefore, void.
3. These cases criticised, and the weight due to them as authority considered.
4. In whatever language a statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect.
5. Hence, a statute which imposes a burdensome and almost impossible condition on the ship-master as a prerequisite to his landing his passengers with an alternative payment of a small sum of money for each one of them is, in fact, a tax on the ship-owner for the right to land such passengers, and in effect, on the passenger himself, since the ship-master makes him pay it in advance as part of his fare.
6. Such a statute of a state is a regulation of commerce, and when applied to passengers from foreign countries is a regulation of commerce with foreign nations.
7. It is no answer to the charge that such regulation of commerce by a state is forbidden by the Constitution to say that it falls within the police power of the states, for to whatever class of legislative powers it may belong, it is prohibited to the states if granted exclusively to Congress by that instrument.
8. Though it may be conceded that there is a class of legislation which may affect commerce, both with foreign nations and between the states, in regard to which the laws of the states may be valid in the absence of action under the authority of Congress on the same subjects, this can have no reference to matters which are, in their nature, national, or which admit of a uniform system or plan of regulation.
9. The statutes of New York and Louisiana, here under consideration, are intended to regulate commercial matters which are not only of national but of international concern, and which are also best regulated by one uniform rule, applicable alike to all the seaports of the United States. These statutes are, therefore, void, because legislation on the subjects which they cover is confided exclusively to Congress by the clause of the Constitution which gives to that body the "right to regulate commerce with foreign nations."
10. The constitutional objection to this tax on the passenger is not removed because the penalty for failure to pay does not accrue until twenty-four hours after he is landed. The penalty is incurred by the act of landing him without payment, and is, in fact, for the act of bringing him into the state.
11. This court does not, in this case, undertake to decide whether or not a state may, in the absence of all legislation by Congress on the same subject, pass a statute

strictly limited to defending itself against paupers, convicted criminals, and others of that class, but is of opinion that to Congress rightfully and appropriately belongs the power of legislating on the whole subject.

APPEAL from the circuit court of the United States for the Southern District of New York, and from the circuit court of the United States for the District of Louisiana.

Mr. Justice MILLER delivered the opinion of the court.

In the case of *The City of New York v. Miln*, reported in 11 Peters, 103, the question of the constitutionality of a statute of the state concerning passengers in vessels, coming to the port of New York, was considered by this court. It was an act passed February 11, 1824, consisting of several sections. The first section — the only one passed upon by the court — required the master of every ship or vessel arriving in the port of New York from any country out of the United States, or from any other state of the United States, to make report in writing, and on oath, within twenty-four hours after his arrival, to the mayor of the city, of the name, place of birth, last legal settlement, age, and occupation of every person brought as a passenger from any country out of the United States, or from any of the United States, into the port of New York, or into any of the United States, and of all persons landed from the ship or put on board, or suffered to go on board any other vessel during the voyage, with intent of proceeding to the city of New York. A penalty was prescribed of seventy-five dollars for each passenger not so reported, and for every person whose name, place of birth, last legal settlement, age, and occupation should be falsely reported.

The other sections required him to give bond on the demand of the mayor, to save harmless the city from all expense of support and maintenance of such passenger, or to return any passenger deemed liable to become a charge, to his last place of settlement, and required each passenger, not a citizen of the United States, to make report of himself to the mayor, stating his age, occupation, the name of the vessel in which he arrived, the place where he landed, and name of the commander of the vessel. We gather from the report of the case that the defendant, Miln, was sued for the penalties claimed for refusing to make the report required in the first section. A division of opinion was certified by the judges of the circuit court on the question whether the act assumes to regulate commerce between the port of New York and foreign ports, and is unconstitutional and void.

This court, expressly limiting its decision to the first section of the act, held that it fell within the police powers of the states, and was not in conflict with the federal Constitution.

From this decision Mr. Justice Story dissented, and in his opinion stated that Chief Justice Marshall, who had died between the first and second arguments of the case, fully concurred with him in the view that the statute of New York was void, because it was a regulation of commerce forbidden to the states.

In *The Passenger Cases*, reported in 7 Howard, 283, the branch of the statute not passed upon in the preceding case came under consideration in this court. It was not the same statute, but was a law relating to the marine hospital on Staten Island. It authorized the health commis-

sioner to demand, and if not paid to sue for and recover, from the master of every vessel arriving in the port of New York from a foreign port, one dollar and fifty cents for each cabin passenger, and one dollar for each steerage passenger, mate, sailor, or mariner, and from the master of each coasting vessel twenty-five cents for each person on board. These moneys were to be appropriated to the use of the hospital.

The defendant, Smith, who was sued for the sum of \$295 for refusing to pay for 295 steerage passengers on board the British ship *Henry Bliss*, of which he was master, demurred to the declaration on the ground that the act was contrary to the Constitution of the United States and void. From a judgment against him, affirmed in the court of errors of the State of New York, he sued out a writ of error, on which the question was brought to this court.

It was here held, at the January term, 1849, that the statute was "repugnant to the Constitution and laws of the United States, and, therefore, void. 7 Howard, 572.

Immediately after this decision the State of New York modified her statute on that subject, with a view, no doubt, to avoid the constitutional objection, and amendments and alterations have continued to be made up to the present time.

As the law now stands, the master or owner of every vessel landing passengers from a foreign port is bound to make a report similar to the one recited in the statute held to be valid in the case of *New York v. Miln*, and on this report the mayor is to indorse a demand upon the master or owner that he give a bond for every passenger landed in the city in the penal sum of \$800, conditioned to indemnify the commissioners of emigration, and every county, city, and town in the state, against any expense for the relief or support of the person named in the bond, for four years thereafter. But the owner or consignee may commute for such bond, and be released from giving it, by paying, within twenty-four hours after the landing of the passengers, the sum of one dollar and fifty cents for each one of them. If neither the bond be given nor the sum paid within the twenty-four hours, a penalty of \$500 is incurred, which is made a lien on the vessel, collectible by attachment at the suit of the commissioners of emigration.

Conceding the authority of the Passenger Cases, which will be more fully considered hereafter, it is argued that the change in the statute now relied upon requiring primarily a bond for each passenger landed, as an indemnity against his becoming a future charge to the state or county, leaving it optional with the ship-owner to avoid this by paying a fixed sum for each passenger, takes it out of the principle of the case of *Smith v. Turner*—the passenger case from New York. It is said that the statute in that case was a direct tax on the passenger, since the act authorized the ship-master to collect it of him; and that on that ground alone was it held void; while in the present case the requirement of the bond is but a suitable regulation, under the power of the state to protect its cities and towns from the expense of supporting persons who are paupers or diseased, or helpless women and children, coming from foreign countries.

In whatever language a statute may be framed, its purpose must be

determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the Passenger Cases.

To require a heavy and almost impossible condition to the exercise of this right, with the alternative of a payment of a small sum of money, is in effect to demand payment of that sum. To suppose that a vessel which once a month lands from 800 to 1,000 passengers, or from 3,000 to 12,000 per annum, will give that many bonds of \$300 with good sureties, with a covenant for four years against accident, disease, or poverty of the passenger named in such bond, is absurd, when this can be avoided by the payment of \$1.50 collected of the passenger before he embarks on the vessel.

Such bonds would amount in many instances for every voyage to more than the value of the vessel. The liability on the bond would be, through a long lapse of time, contingent on circumstances which the bondsman could neither foresee nor control. The cost of preparing the bond and approving sureties, with the trouble incident to it in each case, is greater than the sum required to be paid as commutation. It is inevitable, under such a law, that the money would be paid for each passenger, or the statute resisted or evaded. It is a law in its purpose and effect imposing a tax on the owner of the vessel for the privilege of landing in New York passengers transported from foreign countries.

It is said that the purpose of the act is to protect the state against the consequences of the flood of pauperism immigrating from Europe and first landing in that city.

But it is a strange mode of doing this to tax every passenger alike who comes from abroad.

The man who brings with him important additions to the wealth of the country, who is perfectly free from disease, and the man who brings to aid the industry of the country a stout heart and a strong arm, is as much the subject of the tax as the diseased pauper who may become the object of the charity of the city in a week after he lands from the vessel.

No just rule can make the citizen of France landing from an English vessel on our shore liable for the support of an English or Irish pauper who lands at the same time from the same vessel.

So far as the authority of the cases of *New York v. Miln*, and the Passenger Cases can be received as conclusive, they decide that the requirement of a catalogue of passengers, with statements of their last residence, and other matters of that character, is a proper exercise of state authority, and that the requirement of the bond, or the alternative payment of money for each passenger, is void, because forbidden by the Constitution and laws of the United States. But the Passenger Cases (so called because a similar statute of the State of Massachusetts was the subject of consideration at the same term with that of New York) were decided by a bare majority of the court. Justices McLean, Wayne, Catron, McKinley, and



Grier held both statutes void, while Chief Justice Taney and Justices Daniel, Nelson, and Woodbury held them valid. Each member of the court delivered a separate opinion, giving the reasons for his judgment, except Judge Nelson, none of them professing to be the authoritative opinion of the court. Nor is there to be found in the reasons given by the judges, who constituted the majority, such harmony of views as would give that weight to the decision which it lacks by reason of the divided judgments of the members of the court. Under these circumstances, with three cases before us arising under statutes of three different states on the same subject, which have been discussed as though open in this court to all considerations bearing upon the question, we approach it with the hope of attaining a unanimity not found in the opinions of our predecessors.

As already indicated, the provisions of the Constitution of the United States on which the principal reliance is placed to make void the statute of New York, is that which gives to Congress the power "to regulate commerce with foreign nations." As was said in *United States v. Holliday*, 3 Wall. 417, "Commerce with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign governments." It means trade and it means intercourse. It means commercial intercourse between nations and parts of nations in all its branches. It includes navigation, as the principal means by which foreign intercourse is effected. To regulate this trade and intercourse is to prescribe the rules by which it shall be conducted. "The mind," says the great chief justice, "can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of one nation into the ports of another;" and he might have added with equal force, which prescribed no terms for the admission of their cargo or their passengers. *Gibbons v. Ogden*, 9 Wheaton, 190.

Since the delivery of the opinion in that case, which has become the accepted canon of construction of this clause of the Constitution, as far as it extends, the transportation of passengers from European ports to those of the United States has attained a magnitude and importance far beyond its proportions at that time to other branches of commerce. It has become a part of our commerce with foreign nations of vast interest to this country as well as to the immigrants who come among us to find a welcome and a home within our borders. In addition to the wealth which some of them bring, they bring still more largely the labor which we need to till our soil, build our railroads, and develop the latent resources of the country in its minerals, its manufactures, and its agriculture. Is the regulation of this great system a regulation of commerce? Can it be doubted that a law which prescribes the terms on which vessels shall engage in it is a law regulating this branch of commerce?

The transportation of a passenger from Liverpool to the city of New York is one voyage. It is not completed until the passenger is disembarked at the pier in the latter city. A law or a rule emanating from any lawful authority, which prescribes terms or conditions on which alone the vessel can discharge its passengers, is a regulation of commerce, and in

case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations.

The accuracy of these definitions is scarcely denied by the advocates of the state statutes. But assuming that in the formation of our government certain powers necessary to the administration of their internal affairs are reserved to the states, and that among these powers are those for the preservation of good order by punishment of crime, of the health and comfort of the citizens, and their protection against pauperism, and against contagious and infectious diseases, and other matters of legislation of like character, they insist that the power here exercised falls within this class and belongs rightfully to the states.

This power, frequently referred to in the decisions of this court, has been in general terms somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a state to exercise it in regard to a subject matter which has been confided exclusively to the discretion of Congress by the Constitution.

Nothing is gained in the argument by calling it the police power. Very many statutes, when the authority on which their enactments rest is examined, may be referred to different sources of power, and supported equally well under any of them. A statute may at the same time be an exercise of the taxing power and of the power of eminent domain. A statute punishing counterfeiting may be for the protection of the private citizen against fraud, and a measure for the protection of the currency, and the safety of the government which issues it. It must occur very often that the shading which marks the line between one class of legislation and another is very nice and not easily distinguishable.

But however difficult this may be, it is clear from the nature of our complex form of government that whenever the statute of a state invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, — no difference under what class of powers it may fall, or how closely allied to powers conceded to belong to the states.

"It has been contended," says C. J. Marshall, "that if a law passed by a state, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other like equal opposing powers. But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance thereof. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is supreme." And where the federal government has acted, he says: "In every such case the act of Congress or the treaty is supreme; and the laws of the state, though enacted in the exercise of powers not controverted, must yield to it." 9 Wheaton, 210.

It is said, however, that under the decisions of this court there is a kind of neutral ground, especially in that covered by the regulation of com-

merce, which may be occupied by the state, and its legislation be valid so long as it interferes with no act of Congress or treaty of the United States. Such a proposition is supported by the opinions of several of the judges in the Passenger Cases, by the decisions of this court in *Cooley v. The Board of Wardens*, 12 How. 299, and by the cases of *Crandall v. Nevada*, 6 Wall. 35, and *Gilman v. Philadelphia*, 3 Wall. 713. But this doctrine has always been controverted in this court, and has seldom, if ever, been stated without dissent. These decisions, however, all agree that under the commerce clause of the Constitution, or within its compass, there are powers which, from their nature, are exclusive in Congress; and in the case of *Cooley v. The Board of Wardens*, it was said that "whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." A regulation which imposes onerous, perhaps impossible conditions, on those engaged in active commerce with foreign nations, must of necessity be national in its character. It is more than this, for it may properly be called international. It belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments. If our government should make the restrictions of these burdens on commerce the subject of a treaty, there could be no doubt that such a treaty would fall within the power conferred on the President and Senate by the Constitution. It is, in fact, in an eminent degree, a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected, whether the rule be established by treaty or by legislation.

It is equally clear that the matter of these statutes may be, and ought to be, the subject of a uniform system or plan. The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco. A striking evidence of the truth of this proposition is to be found in the similarity, almost identity, of the statutes of New York, of Louisiana, and California, now before us for consideration in these three cases.

It is apparent, therefore, that if there be a class of laws which may be valid when passed by the states, until the same ground is occupied by a treaty or an act of Congress, this statute is not of that class.

The argument has been pressed with some earnestness, that inasmuch as this statute does not come into operation until twenty-four hours after the passenger has landed, and has mingled with or has the right to mingle with the mass of the population, he is withdrawn from the influence of any laws which Congress might pass on the subject, and remitted to the laws of the state as its own citizens are. It might be a sufficient answer to say that this is a mere invasion of the protection which the foreigner has a right to expect from the federal government when he lands here a stranger, owing allegiance to another government and looking to it for such protection as grows out of his relation to that government.

But the branch of the statute which we are considering is directed to and operates directly on the ship-owner. It holds him responsible for

what he has done before the twenty-four hours commence. He is to give the bond or pay the money, because he *has* landed the passenger, and he is given twenty-four hours' time to do this before the penalty attaches. When he is sued for this penalty, it is not because the man has been here twenty-four hours, but because he brought him here and failed to give the bond or pay \$1.50.

The effective operation of this law commences at the other end of the voyage. The master requires of the passenger, before he is admitted on board, as a part of the passage money, the sum which he knows he must pay for the privilege of landing him in New York. It is, as we have already said in effect, a tax on the passenger, which he pays for the right to make the voyage, — a voyage only completed when he lands on the American shore. The case does not even require us to consider at what period after his arrival the passenger himself passes from the sole protection of the Constitution, laws, and treaties of the United States, and becomes subject to such laws as the state may rightfully pass, as was the case in regard to importations of merchandise in *Brown v. Maryland*, 12 Wheaton, 417, and in *The License Cases*, 5 How. 504.

It is too clear for argument that this demand of the owner of the vessel for a bond or money on account of every passenger landed by him from a foreign shore is, if valid, an obligation which he incurs by bringing the passenger here, and which is perfect the moment he leaves the vessel.

We are of opinion that this whole subject has been confided to Congress by the Constitution; that Congress can more appropriately and with more acceptance exercise it than any other body known to our law, state or national; that by providing a system of laws in these matters, applicable to all ports and to all vessels, a serious question, which has long been matter of contest and complaint, may be effectually and satisfactorily settled.

Whether, in the absence of such action, the states can, or how far they can, by appropriate legislation protect themselves against *actual* paupers, vagrants, criminals, and diseased persons arriving in their territory from foreign countries, we do not decide. The portions of the New York statute which concern persons who, on inspection, are found to belong to these classes, are not properly before us, because the relief sought is to the part of the statute applicable to all passengers alike, and is the only relief which can be given in this bill.

The decree of the circuit court of New York, in the case of *John & Thomas Henderson v. The Mayor of New York & the Commissioners of Emigration*, is reversed, and the case remanded, with direction to enter a decree for an injunction, in accordance with this opinion.

The statute of Louisiana, which is involved in the case of *The Commissioners of Immigration v. The North German Lloyd*, is so very similar to, if not an exact copy of, that of New York, as to need no separate consideration. In this case the relief sought was against exacting the bonds or paying the commutation money as to all passengers, which relief the circuit court granted by an appropriate injunction, and the decree in that case is accordingly affirmed.

## MUNICIPAL BONDS.—EFFECT OF RECITAL OF COMPLIANCE WITH LEGISLATIVE CONDITION PRECEDENT.

## TOWN OF COLOMA v. EAVES.

Where legislative authority has been given to a municipal corporation to subscribe for the stock of a railroad company, and to issue municipal bonds upon some precedent condition to the effect that the officers of the municipal corporation are invested with power to decide whether the condition has been complied with, the recital made in the bonds, that the condition has been complied with, is conclusive, and binds the municipal corporation to their payment in the hands of a *bonâ fide* holder.

The case of *Marsh v. Fulton Co.* (10 Wall. 675) is not inconsistent with the above rule.

IN error to the circuit court of the United States for the Northern District of Illinois.

Mr. Justice STRONG delivered the opinion of the court.

It appears by the record that the plaintiff is a *bonâ fide* holder and owner of the coupons upon which the suit is founded, having obtained them before they were due and for a valuable consideration paid. The bonds to which the coupons were attached were given in payment of a subscription of \$50,000.00 to the capital stock of the Chicago and Rock River Railroad Company, for which the town received in return certificates of five hundred shares of \$100.00 each, in the stock of the company. That stock the town retains, but it resists the payment of the bonds and of the coupons attached to them, alleging that they were issued without lawful authority.

Saying nothing at present of the dishonesty of such a defence while the consideration for which the bonds were given is retained, we come at once to the question whether authority was shown for the stock subscription and for the consequent issue of the bonds. At the outset it is to be observed that the question is not between the town and its own agents. It is rather between the town and a person claiming through the action of its agents. The rights of the town as against its agents may be very different from its rights as against parties who have honestly dealt with its agents as such, on the faith of their apparent authority.

By an act of the Legislature of Illinois, the Chicago and Rock River Railroad Company was incorporated with power to build and operate a railroad from Rock Falls, on Rock River, to Chicago, a distance of about one hundred and thirty miles. The tenth section of the act enacted that "to aid in the construction of said road any incorporated city, town, or township, organized under the township organization laws of the state, along or near the route of said road, might subscribe to the capital stock of said company." That the town of Coloma was one of the municipal divisions empowered by this section to subscribe fully appears, and also that the railroad was built into the town before the bonds were issued. But it is upon the eleventh section of the act that the defendant relies. That section is as follows:—

"No such subscription shall be made until the question has been submitted to the legal voters of said city, town, or township in which the subscription is proposed to be made. And the clerk of such city, town, or township is hereby required, upon presentation of a petition signed by at

least ten citizens, who are legal voters and tax-payers in such city, town, or township, stating the amount proposed to be subscribed, to post up notices in three public places in each town or township; which notices shall be posted not less than thirty days prior to holding such election, notifying the legal voters of such town or township to meet at the usual places of holding elections in such town or township, for the purpose of voting for or against such subscriptions. If it shall appear that the majority of all the legal voters of such city, town, or township voting at such election have voted 'for subscription,' it shall be the duty of the president of the board of trustees, or other executive officer of such town, and of the supervisor in townships, to subscribe to the capital stock of said railroad company, in the name of such city, town, or township, the amount so voted to be subscribed, and to receive from such company the proper certificates therefor. He shall also execute to said company, in the name of such city, town, or township, bonds bearing interest at ten per cent. per annum, which bonds shall run for a term of not more than twenty years; and the interest on the same shall be made payable annually; and which said bond shall be signed by such president or supervisor, or other executive officer, and be attested by the clerk of the city, town, or township in whose name the bonds are issued."

Section 12 provides: "It shall be the duty of the clerk of any such city, town, or township, in which a vote shall be given in favor of subscriptions, within ten days thereafter to transmit to the county clerk of their counties a transcript or statement of the vote given, and the amount so voted to be subscribed, and the rate of interest to be paid."

Most of these provisions are merely directory. But conceding, as we do, that the authority to make the subscription was, by the eleventh section of the act, made dependent upon the result of the submission of the question whether the town would subscribe to a popular vote of the township, and upon the approval of the subscription by a majority of the legal voters of the town voting at the election, a preliminary inquiry must be, how is it to be ascertained whether the directions have been followed? whether there has been any popular vote, or whether a majority of the legal voters present at the election did in fact vote in favor of a subscription? Is the ascertainment of these things to be before the subscription is made and before the bonds are issued, or must it be after the bonds have been sold, and be renewed every time a claim is made for the payment of a bond or a coupon? The latter appears to us inconsistent with any reasonable construction of the statute. Its avowed purpose was to aid the building of the railroad by placing in the hands of the railroad company the bonds of assenting municipalities. These bonds were intended for sale, and it was rationally to be expected that they would be put upon distant markets. It must have been considered that the higher the price obtained for them, the more advantageous would it be for the company, and for the cities and towns which gave the bonds in exchange for capital stock. Everything that tended to depress the market value was adverse to the object the legislature had in view. It could not have been overlooked that their market value would be disastrously affected if the distant purchasers were under obligation to inquire before their purchase, or whenever they demanded payment of principal or interest, whether certain

contingencies of fact had happened before the bonds were issued, — contingencies the happening of which it would be almost impossible for them in many cases to ascertain with certainty. Imposing such an obligation upon the purchasers would tend to defeat the primary purpose the legislature had in view, namely, aid in the construction of the road. Such an interpretation ought not to be given to the statute, if it can reasonably be avoided. And we think it may be avoided.

At some time or other it is to be ascertained whether the directions of the act have been followed, whether there was any popular vote, or whether a majority of the legal voters present at the election did, in fact, vote in favor of the subscription. The duty of ascertaining was plainly intended to be vested somewhere, and once for all, and the only persons spoken of who have any duties to perform respecting the election, and action consequent upon it, are the town clerk and the supervisor, or other executive officer of the city or town. It is a fair presumption, therefore, that the legislature intended those officers, or one of them at least, should determine whether the requirements of the act prior to a subscription to the stock of a railroad company had been met. This presumption is strengthened by the provisions of the 12th section, which make it the duty of the clerk to transmit to the county clerk a transcript or statement, verified by his oath, of the vote given, with other particulars, in case a subscription has been voted. How is he to perform this duty if he is not to conduct the election and to determine what the voters have decided? If, therefore, there could be any obligation resting on persons proposing to purchase the bonds purporting to be issued under such legislative authority, and, in accordance with a popular vote, to inquire whether the provisions of the statute had been followed, or whether the conditions precedent to their lawful issue had been complied with, the inquiry must be addressed to the town clerk or executive officer of the municipality, — to the very person whose duty it was to ascertain and decide what were the facts. The more the statute is examined, the more evident does this become. The 11th section (quoted above) declared that if it should appear that a majority of the legal voters of the city, town, or township voting had voted "for subscription," the executive officer and clerk should subscribe and execute bonds. "If it should appear," said the act. Appear, when? Why, plainly, before the subscription was made and the bonds were executed, not afterwards. Appear to whom? In regard to this there can be no doubt. Manifestly not to a court after the bonds have been put on the market and sold and when payment is called for, but if it shall appear to the persons whose province it was made to ascertain what had been done preparatory to their own action, and whose duty it was to issue the bonds if the vote appeared to them to justify such action under the law. These persons were the supervisor and town clerk. Their right to issue the bonds was made dependent upon the appearance to them of the performance of the conditions precedent. Some person or persons was certainly to decide this preliminary question, and there can be no doubt who was intended by the law to be the arbiter. In *Commissioners v. Nichols*, 14 Ohio St. 260, it was said that "a statute, in providing that county bonds should not be delivered by the commissioners until a sufficient sum had been provided by stock subscriptions, or otherwise, to complete a certain

railroad, and imposing upon them the duty of delivering the bonds when such provision had been made, without indicating any person or tribunal to determine that fact, necessarily delegates that power to the commissioners, and, if delivered improvidently, the bonds will not be invalidated."

In the present case, the person or persons whose duty it was to determine whether the statutory requisites to a subscription and to an authorized issue of the bonds had been performed were those whose duty it was also to issue the bonds in the event of such performance. The statute required the supervisor or other executive officer not only to subscribe for the stock, but also, in conjunction with the clerk, to execute bonds to the railroad company in the name of the town for the amount of the subscription. The bonds were required to be signed by the supervisor or other executive officer, and to be attested by the clerk. They were so executed. The supervisor and the clerk signed them, and they were registered in the office of the auditor of the state, in accordance with an act requiring that, precedent to their registration, the supervisor must certify under oath to the auditor that all the preliminary conditions to their issue required by the law had been complied with. On each bond the auditor certified the registry. It was only after this that they were issued. And the bonds themselves recite that they "are issued under and by virtue of the act incorporating the railroad company," approved March 24, 1869, "and in accordance with the vote of the electors of said township of Coloma, at a regular election held July 28, 1869, in accordance with said law." After all this it is not an open question, as between a *bond fide* holder of the bonds and the township, whether all the prerequisites to their issue had been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the township officers, discharged their duty, the matter has passed into judgment. The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided and certified their decision. They have declared the contingency to have happened, on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision, and beyond those a *bond fide* purchaser is not bound to look for evidence of the existence of things *in pais*. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency, but whether that has happened or not is a question of fact, the decision of which is by the law confided to others, to those most competent to decide it, and which the purchaser is, in general, in no condition to decide for himself.

This we understand to be the settled doctrine of this court. Indeed, some of our decisions have gone farther. In the leading case of *Knox Co. v. Aspinwall* (21 How. 544), the decision was rested upon two grounds. One of them was that the mere issue of the bonds containing a recital that they were issued under and in pursuance of the legislative act, was a sufficient basis for an assumption by the purchaser that the conditions on which the county (in that case) was authorized to issue them had been complied with, and it was said the purchaser was not bound to look farther for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to *The Royal British Bank v. Torquand*, 6 Ellis & Blackburn, 327, a case in the exchequer cham-



ber, which fully sustains it, and the decision in which was concurred in by all the judges. This position taken in *Knox Co. v. Aspinwall* has been more than once reaffirmed in this court. It was in *Moran v. Miami County*, 2 Black, 732; in *Mercer County v. Hackett*, 1 Wall. 83; in *Supervisors v. Schenk*, 5 Wall. 784, and in *Mayor v. Muscatine*, 1 Wall. 384. It has never been overruled, and whatever doubts may have been suggested respecting its correctness to the full extent to which it has sometimes been announced, there should be no doubt of the entire correctness of the other rule asserted in *Knox Co. v. Aspinwall*. That, we think, has been so firmly seated in reason and authority that it cannot be shaken. What it is has been well stated in section 419 of Dillon on Municipal Corporations. After a review of the decisions of this court, the author remarks: "If upon a true construction of the legislative enactment conferring the authority (viz., to issue municipal bonds upon certain conditions), the corporation, or certain officers, or a given body or tribunal are invested with power to decide whether the condition precedent has been complied with, then it may well be that their determination of a matter *in pais*, which they are authorized to decide, will, in favor of the bondholder for value, bind the corporation." This is a very cautious statement of the doctrine. It may be restated in a slightly different form. Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bond fide* purchaser, is conclusive of the fact and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal. In *Bissell v. Jeffersonville* (24 How. 287), it appeared that the common council of the city were authorized by the legislature to subscribe for stock in a railroad company, and to issue bonds for the subscription, on the petition of three fourths of the legal voters of the city. The council adopted a resolution to subscribe, reciting in the preamble that more than three fourths of the legal voters had petitioned for it, and authorized the mayor and city clerk to sign and deliver bonds for the sum subscribed. The bonds recited that they were issued by authority of the common council, and that three fourths of the legal voters had petitioned for the same, as required by the charter. In a suit subsequently brought by an innocent holder for value to recover the amount of unpaid coupons for interest, it was held inadmissible for the defendants to show that three fourths of the legal voters of the city had not signed the petition for the stock subscription. A similar ruling was made in *Van Hostrop v. Madison City*, 1 Wallace, 291, and in *Mercer County v. Hackett*, *Ib.* 88.

The same principle has recently been asserted in this court after very grave consideration, and it must be considered as settled. In *St. Joseph's Township v. Rogers*, 16 Wall. 644, it is stated thus: "Power to issue bonds to aid in the construction of a railroad is frequently conferred upon a municipality in a special manner, or subject to certain regulations,

conditions, or qualifications, but if it appears by their recitals that the bonds were issued in conformity with these regulations, and pursuant to those conditions and qualifications, proof that any or all these recitals were incorrect will not constitute a defence for the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification, which it is alleged was not fulfilled."

There is nothing in the case of *Marsh v. Fulton Co.* 10 Wall. 675, to which we have been referred, at all inconsistent with the rule thus asserted. In that case there were no recitals in the bonds, and there was no decision that the conditions precedent to a subscription, or to the gift of authority to subscribe, had been performed. The question was, therefore, open.

What we have said disposes of the present case without the necessity of particular consideration of the matters urged in the argument of the defendant below. It was inadmissible to show what was attempted to be shown, and even if it had been admissible, the effort to assimilate the case to *Marsh v. Fulton Co.* would fail. There the subscription was for the stock of a different corporation from that for which the people had voted. Here it was not.

*The judgment of the circuit court is affirmed.*

Mr. Justice BRADLEY delivered the following concurring opinion.

I dissent from the opinion of the court in this case, so far as it may be construed to reaffirm the first point asserted in the case of *Knox County v. Aspinwall*, to wit: that the mere execution of a bond by officers charged with the duty of ascertaining whether a condition precedent has been performed is conclusive proof of its performance. If, when the law requires a vote of tax-payers before bonds can be issued, the supervisor of a township, or the judge of probate of a county, or other officer or magistrate, is the officer designated to ascertain whether such vote has been given, and is also the proper officer to execute and who does execute the bonds; and if the bonds themselves contain a statement or recital that such vote has been given; then, the *bond fide* purchaser of the bonds need go back no further. He has a right to rely on the statement as a determination of the question. But a mere execution and issue of the bonds without such recital is not, in my judgment, conclusive. It may be *prima facie* sufficient; but the contrary may be shown. This seems to me to be the true distinction to be taken on this subject, and I do not think that the contrary has ever been decided by this court. There have been various *dicta* to the contrary, but the cases, when carefully examined, will be found to have had all the prerequisites necessary to sustain the bonds, according to my view of the case. This view was distinctly announced by this court in the case of *Lynde v. The County of Winnebago*, 16 Wall. 13. In the case now under consideration, there is a sufficient recital in the bond to show that the proper election was held and the proper vote given; and the bond was executed by the officers whose duty it was to ascertain these facts. On this ground, and this alone, I concur in the judgment of the court.

## SUPREME COURT OF CALIFORNIA.

[FEBRUARY, 1876.]

TAXATION. — MORTGAGES NOT SUBJECT TO TAXATION UNDER THE CONSTITUTION OF CALIFORNIA.

PEOPLE v. HIBERNIA SAVINGS INSTITUTION.

A constitutional provision that "all property shall be taxed according to its value" does not authorize the taxation of mortgages.

OPINION by MCKINSTRY, J., — NILES, J., concurring.

"Taxation shall be equal and uniform throughout the state. All property in this state shall be taxed in proportion to its value to be ascertained as directed by law; but assessors and collectors of town, county, and state taxes shall be elected by the qualified electors of the district, county, or town in which the property taxed for state, county, or town purposes is situated." Constitution of California, article 11, section 15.

There is no provision in the Political Code which requires, in terms, that debts secured by mortgage shall be taxed. That Code requires that all property shall be taxed, and section 17 declares: "The words 'personal property' include money, goods, chattels, *evidence of debt, and things in action.*"

Unless the provision of the Constitution above quoted restrains or limits the power of the legislature so as to prohibit the taxation of "evidences of debt and things in action," it is the duty of the assessors to assess not only mortgages, but all debts "solvent" or not solvent, and also all rights of action, whether arising *ex contractu* or *ex delicto*.

And this, 1st, because it is the established law that *all* property must be taxed, and the legislature has no power to exempt any property; and 2d, because the legislature has declared that all property shall be taxed, and attempted to include in the definition of property *all choses in action*.

But to declare that it is the duty of the assessor to assess all "things in action," is to give a construction to the Constitution which must lead to the greatest absurdities. The Constitution, in its application to the various departments of the government, and to individual rights, must receive such a construction as to give it a practical operation. There would be a contradiction in the single section of the Constitution if it were construed as requiring that *all* property should be taxed equally and uniformly with reference to its value, and that the word property includes all those things practically incapable of an appraisement bearing any definite relation or proportion to other things or property.

That choses in action are dependent on too many contingencies to be capable of appraisement which shall accord with any rule of equality or uniformity of value, is too plain for argument.

Yet the Constitution requires that all property shall be assessed on the *ad valorem* principle by local assessors. All property which is visible

and tangible is capable of such assessment; choses in action are not. The word "property" has been used in our language in several senses; but in the case in hand we cannot be limited to the meaning given it by the Code, but may also — and such is our duty — look for its meaning in the Constitution. The Constitution provides that no property, as property, shall be taxed except such as is capable of a valuation by the assessors, which shall be ratably equal and uniform with that affixed to all other property.

In *Houghton v. Austin*, 47 Cal. 661, it was held that taxation must be thus equal and uniform, and in *People v. San Francisco Savings Union*, 31 Cal. 188, that a valuation by an assessor is the very foundation of proceedings for apportioning and collecting a tax on property.

The 13th section of article 11 of the Constitution requires that each article of property, capable of valuation, shall be fixed or estimated, and the owner thereof made to pay a sum which shall bear the same proportion to the whole amount levied, as does the particular property to the aggregate value of all the property in the state or tax district.

Under our Constitution, therefore, the subject of taxation is the sum of all the values.

Independent of other constitutional restrictions, the state might take such portions of the wealth within its borders, the burden being distributed with uniformity, as the legislative department may deem necessary for the support or defence of the government. In this respect there would be no limitation, save that resulting from moral considerations, addressing themselves to the consciences of individual legislators. Supposing — what would thus be possible in theory — that the necessities of government required a tax of one hundred per cent. on all values, or, what would be the result of such a tax, an appropriation of all the property in the state — it is plain that the state would receive no benefit from evidences of debt due by some of her citizens to others, and payable out of the tangible property which the state has already taken.

It is property in possession or enjoyment, and not merely in right, which must ultimately pay every tax.

The legislature may declare that a cause of action shall be taxed, but a cause of action cannot pay the tax, and this because it has, and can have no value independent of the tangible wealth out of which it may be satisfied.

In a certain sense a promissory note, or any credit, is property. Whether "solvent," as the term is ordinarily employed, or not, it may be assessed for value; it would be difficult, however, to explain why a note discounted at twenty per cent. should be less appropriately called "property" than one sold at par. In any case, a credit has no value other than the value it has acquired by means of the probability that the property having present actual value, upon which a tax is levied and collected, will be applied to the satisfaction of the claim it represents. He who has the property in possession must be taxed on its value, and the value once taxed cannot be retaxed without a violation of the constitutional provision that each value shall be taxed proportionally to the sum of all the values.

The sovereign power of the people, in employing the prerogative of tax-

ation, regards not the claims of individuals on individuals, but deals with the aggregate wealth of all; that which is supposed to be unlimited is here limited by an inexorable law which parliaments cannot set aside, for it is only to the actual wealth that governments can resort, and that exhausted, they have no other property resource. This is as certain as that a paper promise to pay is not money.

It may not be possible in every case to show that the debtor has paid the tax assessed to his creditor. But it admits of mathematical demonstration, if the other property in the state has been assessed at its value, that the money which shall ultimately satisfy the debt, if it is ever satisfied, has paid its tax. If it were practicable to assess all the property in the state at the same moment of time, it would be clear to every mind that an assessment of a credit was an attempt to transfer to it a value elsewhere assessed. It may happen as the assessor goes his round that the same piece of tangible personal property is in fact twice taxed; but in every such case the presumption is that the first found in possession has parted with it for its value; that when the second person is assessed, the first has received other property of like value to that twice assessed; so that the uniformity required by the Constitution is maintained in effect. But if a debtor is found to be the owner of one thousand dollars, and is assessed for that sum; and his creditor is found to be the owner of his note for \$1,000, and is assessed for a like sum; and if, the day after the visit of the assessor to the creditor, the debtor shall pay his note, it is clear that the same value has been twice taxed; since the debtor has parted with his money, and received that which is certainly not taxable property in *his* hands, and which can never afterwards be assessed. When a debtor pays his debt, he does not abstract or destroy any portion of the taxable property of the state; the aggregate of value remains the same.

In *People v. Eddy*, 43 Cal. 336, decided at the April term, 1872, this court said: "The word 'property' is used in that section of the Constitution in its ordinary and popular sense, and this is the general rule in the interpretation of constitutions and statutes, unless the context shows that the words are used in some technical or arbitrary sense." With this general proposition I fully agree, but I am not prepared to admit that in its vulgar sense, the word "property" includes *all choses in action*. And I feel compelled to dissent from the statement which follows, in the same opinion: "There is no good reason to believe that the word was used in that section (section 13, article 11) in a sense materially differing from that which it has in other sections of that instrument." A single illustration will show that the foregoing is not literally correct. It has never been doubted in these arguments that gold and silver money is property which may be taxed. Such coins are more than promises to pay; they are composed of metals recognized as standards of value throughout the commercial world, and everywhere of purchasing capacity. But it has been repeatedly held that the clause of the Constitution (art. 1, sec. 8), "nor shall private *property* be taken for public use without just compensation," prohibits the taking of money. The reason is apparent. The compensation spoken of is money, and it would lead to an absurdity to say that money should be taken for the public, only in

case an equal sum of money should be paid to the citizen when the money was taken. Such is the uncertainty of human language, that it is absolutely necessary to consider the *context* in order to determine the sense in which a particular word is employed, if it can ever be employed in more than one.

The facts of the present case do not present any question as to the power of the legislature to require the payment of a specific sum by way of license for the transaction of a particular business, or the performance of particular acts.

The views above expressed remove the objection heretofore resorted to that the creditor cannot complain if the debtor shall pay a double tax. The creditor can always complain because the credit should not be taxed at all, inasmuch as it has no independent value, and, therefore, cannot be taxed in proportion to such value — as part of the aggregate of value — in the manner required by the Constitution.

And in the foregoing an effort has been made to abstain from any reference to the moral effects of a species of legislation which ordinarily transfers the burden of taxation from the lender to the borrower, and encourages misrepresentation and perjury by permitting the collection of a tax to depend upon the oath of the creditor, based on his *opinion* of the solvency of his debtors. The case should be decided by reference to the power of the legislature under the Constitution.

I am of the opinion that "credits" are not "property" subject to taxation within the meaning of the section of the Constitution above quoted.

*Judgment reversed and cause remanded. Remittitur forthwith.*

WALLACE, C. J., concurring. The question in hand is whether "credits" are "property" in the sense in which the latter word is employed in the thirteenth section of the eleventh article of the Constitution, which requires all "property" to be taxed in proportion to its value.

It is not to be doubted, of course, that even though credits be not property in the sense referred to, and consequently not to be taxed *as property*, the legislature may, nevertheless, in its discretion, impose a tax upon such credits, — as, for instance, it may require stamps of graduated denomination to be affixed to each promissory note or evidence of indebtedness executed, — which form of tax, when put in operation, would probably enable everybody, certainly all borrowers, to realize the important truth, that a tax imposed upon credits, *in whatever form it may be imposed*, must always be paid, *not by the creditor, but by the debtor*.

Returning then to the question whether credits must be considered to be "property" in the sense adverted to, it will be remembered that the affirmative was maintained here in *People v. Eddy*, 43 Cal. 331. The question, however, involving, as it does, the correct construction of the text of the Constitution itself, in respect to a matter of such great and constantly recurring importance as the working of the general revenue system of the state, is not, in my opinion, to be determined by reference to mere precedents, or to decisions already made.

Considerations, upon which the doctrine of *stare decisis* is supposed to be founded, certainly do not attach to a controversy of this character. A reëxamination of the general question, wholly unembarrassed by what

our predecessors or we ourselves may have said, if seen to have been ill-founded in law, does not involve either the possible disturbance of vested rights, or the overthrow of the rules of property supposed to have become fixed and settled.

I am of the opinion that credits are not property, in the sense in which the word *property* is used in the thirteenth section of the eleventh article of the Constitution. That credits are correctly designated as "property," in a general sense, no one, of course, will deny; and that they fall within the true meaning of that word, as employed in other portions of the Constitution, is readily conceded.

But, as observed by Vattel, "It does not follow either logically or grammatically that because a word occurs in one section with a definite sense that therefore the same sense is to be adopted in every other section in which it occurs." Book 2, ch. 17, sec. 285.

It certainly requires neither discussion nor authority to show that in searching for the true sense in which a word has been used in a particular instance, it is proper, in fact often indispensable, to consider as well the subject matter which it concerns, as the immediate connection in which it was used. Neither philology nor criticism, of themselves, afford safe rules for the interpretation of the language of statesmen used in establishing a system of finance, and providing for the physical necessities of the state.

The language found in the thirteenth section of the eleventh article of the Constitution, referred to, is as follows: "Taxation shall be equal and uniform throughout the state. All property in this state shall be taxed in proportion to its value," &c.

This provision of the Constitution established the cardinal rule that property taxation in this state should always be imposed upon an *ad valorem*, as contradistinguished from a specific basis, and may be paraphrased thus: "All the actual wealth within this state shall be equally burdened with the support of the government." That *property*, as here employed in the Constitution, and "*actual wealth*," as used in the paraphrase are synonymous, and that each of them alike excludes mere credits, is believed to be demonstrable. In the nature of things, both the scale of public expenditure indulged, and the consequent degree of taxation necessary for its supply, have reference to the actual aggregate wealth of the political community to which government looks for support. These habitually vary as the state is popularly said to be comparatively rich or comparatively poor.

The legislature, in making up the budget, must necessarily, therefore, look to the aggregate amount of actual wealth in the hands of the people and borne upon the tax rolls. This constitutes the capacity to pay, which it is always indispensable for the statesman to consider. And in considering it, how, it may be asked, can it be supposed that the aggregate wealth of the people, their actual capacity to pay taxes, is at all made up of credits—the mere indebtedness owing by individual members of body politic to others of its members?

An answer would perhaps most readily be found in supposing, were such a thing possible, that the entire tax rolls exhibited nothing but such indebtedness. Taxation attempted under such circumstance would, of course, be wholly fanciful, as having no actual basis for its exercise.

It must result, therefore, that mere credits are a false quantity in ascertaining the sum of wealth which is subject to taxation as property, and that, in so far as that sum is attempted to be increased by the addition of those credits, property taxation, based thereon, is not only merely fanciful, but necessarily the unconstitutional imposition of an additional tax upon a portion of the property already once taxed. Thus, if there be within the state only one million and a half in actual material wealth, and if there be in addition a half million of credits, a tax of one per cent. imposed upon the two millions thus made up will prove to be in reality a double tax upon that portion of the one million and a half of actual wealth which is represented a second time as credits, from which double tax the remainder of the actual wealth, however, will escape altogether. To illustrate: let it be supposed that it is shown by the roll that one million and a half of actual wealth is made up of one million in *goods* and one half million in *money*, and that the *loan* of the half million in money has created the half million in *credits*. It will be seen that while the one million in goods are set down upon the rolls but once, the half million of money is set down twice for the purpose of taxation; once as money in the hands of the borrowers, again as money in the hands of the lenders—in the form of “credits”—that is to say, the promissory notes given by the borrowers. The goods, being represented but once, are taxed but once; the money, however, being represented twice upon the assessment roll, is twice taxed. This assuredly is not *the equal taxation of property* guaranteed by the Constitution.

The taxation thus imposed nominally upon “credits” having resulted in the double taxation of the money, the additional tax must, of course, be paid by some one. And here all human experience, as well as the settled theories of finance, concur that it is not the lender who pays, but the borrower. The borrower is the consumer. The interest which he pays to the lender is the prime cost of the delay for which he has contracted. If the government, by the imposition of additional taxes, increase the cost, the borrower, being the consumer, must pay for it. The truth of this proposition is indeed so generally recognized that it is not unusual to insert in the instrument by which the repayment of the loan is secured, a distinct covenant upon the part of the borrower to refund to the lender all taxes which the latter may be compelled to pay by reason of the loan; and even where the covenant is omitted, the lender is doubtless fully protected at the expense of the borrower, by the exaction of an increased rate of interest upon the loan. To hold, therefore, that “credits” constitute “property” within the intent of the thirteenth section of the eleventh article of the Constitution, would be to attribute a meaning to the word property as there used, which would not promote, but utterly defeat, the uniformity of property taxation in this state, which it was the principal purpose of that section to secure.

I, therefore, concur that the judgment of the court below be reversed.

CROCKETT, J., concurring. I concur in the opinion of Mr. Justice McKinstry, and while it is not to be denied that the proposition that solvent debts are not “property” for the purposes of taxation within the intent of article 11, section 13, of the Constitution, it is in conflict with several prior decisions of this court. I am satisfied upon more mature



deliberation, and in the light of the latter and more exhaustive arguments of the questions, that the former rulings on this point cannot be supported. The Constitution being the fundamental law, it is of the utmost consequence to the people that its provisions should be properly construed. This is peculiarly true of those provisions relating to the power of taxation, — a power more subject to abuse than any other, and which directly affects the interest of every citizen. Whatever weight may be due to the rule of *stare decisis*, as applied to other subjects, it ought not, in my opinion, to prevent a return to a proper construction of those provisions of the Constitution which affect the vital question of taxation. No great property rights have grown up under the former construction, which can be injuriously affected by the change in the rule; and I discover no sufficient reason for persisting in a construction, the only effect of which, in a large majority of cases, is to inflict upon the borrowers of money an unjust and oppressive system of double taxation. That this is the necessary result of a tax on debts secured by mortgage for money loaned is, in my opinion, too plain to admit of debate. In the case of the *Savings & Loan Society v. Austin*, 46 Cal. 415, I have stated at length my reasons for that opinion, and it is unnecessary to repeat them here. I still adhere to that opinion; and in addition to the reasons stated by Mr. Justice McKinstry, why the tax involved in the present case should be set aside, I think that the facts disclosed by this record present a clear case of double taxation of the same subject matter; and the tax having been paid by the mortgagors, cannot again be collected from the mortgagee.

But while holding that solvent debts are not "property" in the sense of article 11, section 13, of the Constitution, and, therefore, are not required to be taxed on the *ad valorem* principle, it does not follow that the legislature is for that reason powerless to tax them in some other form. It exercises unquestioned the right to tax avocations, not because an avocation is property, but because the mode of taxation is unlimited, except in so far as they are restricted by the Constitution; and article 11, section 13, prescribes the method only in respect to such subjects of taxation as are "property" in the sense of that clause. Solvent debts not being "property" in that sense, cannot be taxed as such under that provision, as was attempted to be done in the present case. But it might be competent for the legislature to require a stamp tax on a mortgage or a promissory note, for the same reason that it may tax the avocation of an auctioneer. In that event it would be a tax on the transaction of making the note or mortgage, and not a tax on the debt as property.

Mr. Justice RHODES dissents.

## SUPREME COURT OF NEW HAMPSHIRE.

To appear in 55 N. H. )

PROMISSORY NOTE. — SIGNATURE OBTAINED BY FRAUD. — NEGLIGENCE.

## CITIZENS' NATIONAL BANK v. SMITH.

The defendant was induced to sign his name, as maker, to a negotiable promissory note, by the false and fraudulent representations that it was a contract of an entirely different character, whereby he would incur no pecuniary liability; but it appeared further, that it was a negligent act on his part to sign the note without ascertaining whether it was what the payee represented, or something else. *Held*, that the defendant was precluded by his negligence from setting up the fraud against a *bonâ fide* holder of the note who had purchased it for value before due.

THIS action was, at the September term, 1874, committed to a referee, who, at this term, reported the following facts: —

This is an action of assumpsit upon a promissory note, of which the following is a copy: "Tilton, N. H., January 1st, 1872. Nine months after date, I promise to pay, to the order of R. M. Grems, one hundred and forty dollars, at my residence in Tilton, N. H., value received and int. Due Oct. 4, '72. Lorenzo Smith." On the back of said note is the following: "Without recourse. R. M. Grems." "Demand and notice waived. Leonard Gerrish." The plaintiffs purchased the note, a short time after its date, in good faith, without notice of any defect. The signature is genuine, but the note is wholly without consideration. The defendant did not contract to give any note, nor know or have any suspicion that it was a note he was signing, but was fraudulently induced by the payee to sign it under the pretence that it was an agreement to become agent of a patent hay-fork, and upon the representation by the payee that the defendant was to incur no pecuniary liability. It was a negligent act on the part of the defendant to sign the note without ascertaining whether it was what the payee represented, or something else. [At the request of the defendant, I add the following: The defendant is an old man, of limited education and poor eyesight, and is not in the habit of writing except to sign his name. To this, at the request of the plaintiffs, I add the following: His daughter, an intelligent woman, was present when the note was signed, and had an opportunity to read it.] A few days after the note fell due, the defendant, having learned that the plaintiffs had it, called at the bank and examined it, and gave notice to the cashier that he should not pay it. There was no proof that payment of the note was ever demanded at the defendant's house. The defendant's counsel, on the day after the hearing closed, took the position, in a letter to the referee, that the action cannot be maintained for want of a demand at the defendant's house. The referee ruled, *pro forma*, that the plaintiffs are entitled to recover, and finds that the defendant did promise, in manner and form as the plaintiffs have declared, and assesses the damages in the sum of one hundred and forty dollars, and interest from January 1, 1872; but if the court shall be of opinion that upon the

foregoing facts the plaintiffs are not entitled to recover, then the referee finds that the defendant did not promise in manner and form as the plaintiffs have declared.

The questions arising on the foregoing report were transferred to this court for determination by Rand, J.

*Pike & Blodgett*, for the defendant. It appears from the case: (1.) that the defendant did not contract to give any note; (2.) that he did not know or have any suspicion that it was a note he was signing; (3.) that his signature was obtained by fraud, and under the pretence that it was an agreement to become agent for a patent hay-fork, and that he was to incur no pecuniary liability; (4.) that the note is wholly without consideration; (5.) that the defendant is an old man, of limited education, and poor eyesight, and not in the habit of writing except to sign his name; and (6.) that the plaintiffs are innocent holders for value before maturity.

I. The facts reported present an instrument in the form of a promissory note, but the substance is wholly wanting. There was no knowledge, no consideration, no consent, and no delivery on the part of the defendant. What he did was not through the free and *bond fide* exercise of his will, but through an outrageous and unmitigated fraud. Our position therefore is, that the instrument upon which the plaintiffs seek to recover is not legally or in fact the note of the defendant; that he is no more bound by it than if it were a total forgery, signature included; and that, in contemplation of law, it is but a blank piece of paper to which no additional validity can be given, because it is in form negotiable or in the hands of an innocent holder for value before maturity. It is notorious that hundreds of similar instruments have been recently obtained in a like manner in this state by parties who have been driven from other states by the decisions of the court, and the questions arising in the present case are therefore of great importance. However it may have been formerly, the uniform current of the latter decisions in this country is against the validity of such instruments, and the principles upon which such decisions are based may well be considered to be firmly established as sound rules of law, founded in reason. "The maker of a promissory note, whose signature is obtained without his consent or knowledge, will not be held on the note, even in the hands of an innocent holder, for value before maturity." *Briggs v. Ewart*, 51 Mo. 245. The court say, in their opinion in this case (January term, 1873): "It may well be assumed as an axiom too well settled to be disputed, that no one can be made a party to a contract without his own consent. Although his signature may be put to the writing and may have been written by himself, yet, if he did not know what he was signing, but acted honestly under the belief that he was signing some other paper and not the one he really signed, he ought not to be bound by such signature. In the execution of instruments of writing, such as contracts, deeds, &c., the mind must act intelligently, and the instrument must not only be signed, but delivered by the party as and for what he intended it for. Commercial paper is no exception to this rule, only that in some cases a party, knowingly putting his name to such paper, may, by his own negligence, be estopped from disputing its execution

as against an innocent holder for value. . . . The point is, that the mind must act in the execution of the paper. It must be executed as and for the paper it purports to be. If the mind is drawn away from it by fraud or otherwise, and the party is induced to sign it as and for another instrument from what it purports to be, then there is no consent given and no delivery made or authorized to be made of the paper so signed. If such paper purports to be a negotiable note, it is void as to the payee and all other holders, whether innocent purchasers or not." *Ib.* 249, 250. "The maker of a promissory note may defend against a *bond fide* holder for value, on the ground that when he signed the note it was represented and he believed it to be a contract of an entirely different character. This class of cases forms an exception to the general rule regarding the liability of makers of promissory notes to *bond fide* holders, and may be ranked with notes declared void by statute." *Whitney v. Snyder*, 2 Lans. (N. Y.) 477. "A promissory note, incorporated by a patent right vendor into a pretended contract for an agency to sell certain machines, the signer not being able to read writing with facility; held, in an action by an innocent holder, to be invalid through fraud." *Puffer v. Smith*, 57 Ill. 527. This decision is founded upon *Taylor v. Atkinson*, 54 Ill. 196, decided June term, 1870. "The delivery of a promissory note by the maker is necessary to a valid inception of the contract. The possession of a promissory note by the payee or indorsee is *prima facie* evidence of a delivery. But if it were put in circulation by force or fraud without fault on the part of the maker, there can be no recovery upon it, even in the hands of an innocent holder." *Burson v. Huntington*, 21 Mich. 416. "When the defendant unwittingly signs an instrument in the form of a negotiable promissory note, relying upon false representations, made to him at the time, that the instrument he is signing is a mere duplicate of a contract just previously signed by him, making him the agent for the sale of a patent hay-fork, under circumstances devoid of negligence on his part, . . . and he delivers the same in ignorance of its true character, believing it to be the mere duplicate contract which he supposed he had signed, such instrument is to be regarded as a forgery, and cannot be enforced in the hands of a *bond fide* purchaser. The maxim, that when one of two innocent persons must suffer by the acts of a third, the loss must be borne by the person who enables such third person to occasion it, does not apply to such a case. This maxim supposes the action of the person upon whom it imposes the loss to have proceeded from intelligence, and not to have been the result of duress. It presumes the assent of the will of the actor. If from any cause the assent of the will is wanting, the result is the same as if the act were done under duress, or by an insane man." *Gibbs v. Linabury*, 22 Mich. 479. See, also *Aude v. Dixon*, 6 Exch. 869. The same doctrine is also held in *Walker v. Ebert*, 29 Wisc. On page 197 of the opinion, Dixon, C. J., says: "The inquiry goes back of all questions of negotiability, or of the transfer of the supposed paper to a purchaser for value, before maturity and without notice. It challenges the origin or existence of the paper itself; and the proposition is, to show that it is not, in law or in fact, what it purports to be, namely, the promissory note of the maker. For the purpose of setting on foot or pursuing this inquiry,

it is immaterial that the supposed instrument is negotiable in form, or that it may have passed to the hands of a *bonâ fide* holder for value. Negotiability in such cases presupposes the existence of the instrument as having been made by the party whose name is subscribed; for, until it has been so made and has such actual legal existence, it is absurd to talk about a negotiation or transfer, or *bonâ fide* holder of it, within the meaning of the law merchant. That which in contemplation of law never existed as a negotiable instrument, cannot be held to be such; and to say that it is and has the qualities of negotiability because it assumes the form of that kind of paper, and thus to shut out all inquiry into its existence, or whether it is really and truly what it purports to be, is *petitio principii*—begging the question altogether." So, also, in *Kellogg v. Steiner*, 29 Wisc. 626, it is held that "where one is induced by fraud, and without laches on his part, to sign a negotiable note supposing it to be a non-negotiable instrument, such note is invalid, even in the hands of an innocent third party." To the same effect is *Chapman v. Rose*, 44 How. (N. Y.) 364. *Cline v. Guthrie*, 42 Ind. 227, was another hay-fork agency swindle. The head notes are: "Where the maker of a promissory note, payable at a bank in this state, was induced by the fraud and circumvention of the payee to sign his name to such note, when he honestly supposed and believed that he was writing his name on a blank piece of paper to enable the payee to see how his name was spelled or written, and the maker did not, after he discovered that he had so signed his name to the note, voluntarily deliver it to the payee, but it was taken possession of wrongfully and forcibly by the payee, and by him carried away against the consent of the maker and negotiated; *held*, that the maker was no more bound by his signature than if it were a total forgery, although the person to whom it was negotiated was a purchaser and holder in good faith and for a valuable consideration before maturity; *held, also*, that, admitting that the maker signed his name to the note with full knowledge of its character, it was nevertheless invalid and void, even in the hands of an innocent purchaser for value, for the want of delivery; nor was the maker liable on the ground that when one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it." *Detwiller v. Bush*, 44 Ind. 70, decided the same year (1873), was as follows: "Complaint upon a promissory note, payable at a bank in this state, and indorsed by the payee to plaintiff before maturity. Answer. That there was no agreement or contract between the defendant and the payee by which a note was to be made; that no note was shown or read to the defendant, but alleging that there was a contract about other matters which was signed by the defendant; and if the note in suit was contained in the paper signed, it was so disguised and concealed that the defendant could not with reasonable diligence have discovered the same; that he never gave the note, and if his signature to it is genuine, it was obtained without his knowledge or consent, by fraudulent means to him unknown, &c. *Held*, that the answer was good on demurrer." "Forgery may be committed by deceitfully and fraudulently obtaining the signature of a party to an instrument which he has no intention of signing." *Clay v. Schwab*, 1 Mich. (N. P.) 168. "Where a person writes his name on a blank piece of paper, to be used for the pur-

pose of identifying his signature, and the person to whom it is given, without the knowledge of the other, writes over such signature a promissory note, which is negotiated before maturity to an innocent holder, it will be held that the instrument is a forgery, and the holder not entitled to recover." *Caulkins v. Whisler*, 29 Iowa, 495. See, also, *Nance v. Lary*, 5 Ala. (N. S.) 870. "Where the signature of the promisor was obtained by fraud, the note is void in the hands of an innocent holder." *Dunn v. Smith*, 12 Sm. & M. (Miss.) 602. "A total fraud in the consideration of a promissory note, or in the manner of obtaining it, will render the note void." *Shepherd v. Hall*, 1 Conn. 329.

II. But the referee finds that it was a negligent act on the part of the defendant in not ascertaining what he was signing. Some of the cases apparently make this finding material, and if it is, we ask the court to revise it. The right to do this will hardly be questioned: first, because negligence is a mixed question of law and fact, and where the facts have first been ascertained, whether they constitute negligence or not is a matter of law (1 Hill. on Torts, 132, and cases cited); and, second, because the power of revision is expressly conferred by section thirteen of the act under which the referee was appointed. We contend that the conclusion of the referee is both unfounded and unjust. Practically, it holds the defendant to the highest rule of diligence and prudence which could be required of anybody; for no one, with the utmost care and the greatest capacity and business ability, could, under the circumstances, have done more than to ascertain what he was signing. To hold the defendant up to such a rule is contrary to the instinctive sense of reason and justice, and has no foundation in law or equity. Negligence is from its nature a relative term. What constitutes negligence in any given case depends upon the circumstances of that case.

*Barnard*, for the plaintiffs. The case finds that the plaintiffs purchased the note in suit before its maturity, in good faith, without notice of any defect. The defendant claims that, as between him and the payee of the note, he was defrauded, and for this reason he denies his liability to pay the note. It seems to me the rights of the parties on this state of facts have been too long and too often settled, both by the courts of this and other states, to be seriously questioned. The doctrine of our own courts, from *Perkins v. Chellis*, 1 N. H. 254, which was an action of assumpsit for a note fraudulently obtained for a worthless patent right, to *Clark v. Whitaker*, 50 N. H. 474, when applied to facts as they appear in this case, is uniform. I think that, as stated in *Doe v. Burnham*, 31 N. H. 431, "a *bonâ fide* holder for a valuable consideration, who became such before the dishonor of the note, takes it free from all defences between prior parties." See, also, *Clement v. Leverett*, 12 N. H. 817, where the sale of a bill of exchange amounted substantially to a larceny of the amount from the drawer. *Emerson v. Crocker*, 5 N. H. 159; and *Clark v. Pease*, 41 N. H. 414. In the last case this doctrine was fully discussed, and the same defence was urged by counsel as in this case, that the whole essence of a contract was wanting between the original parties; as it was, there being no free exercise of the mind or will, the doctrine laid down in *Doe v. Burnham*, above cited, was again affirmed by the court, subject only to such exceptions as belong to general rules. The learned chief justice, after considering the

exceptions, suggested the following as a safe guide to dealers in commercial paper: First, he must assure himself of the genuineness of the signature, or, if signed by an agent, that he was duly authorized; second, he must make such inquiries as to ascertain that the signer was not an infant or married woman, an alien enemy, an insane person, or some one who is always presumed by the law to be incompetent to contract; third to inquire whether the signer of the note had been trustee, or whether his claim would be affected by any other special statute. When he has satisfied himself on these points, if he learns of no other defect, and the signer is of sufficient ability, he may purchase. But suppose it should turn out that the note was obtained of the maker by fraud, or by duress, when the maker was in no fault, what rule shall then be applied? The long established one, that, when one of two innocent persons must suffer, the loss should fall upon him who has suffered a negotiable security with his name attached to it to get into circulation, and thereby mislead the indorsee. Such rules and such application of them are necessary to give security to negotiable paper. See authorities cited in *Clark v. Pease*, before cited; 1 Pars. on Notes, 279; *Sweetser v. French*, 2 Cush. 309-313; *Gould v. Legee*, 5 Duer, 260; *Powers v. Ball*, 27 Vt. 662; *Humphrey v. Clark*, 27 Conn. 381; *Griswold v. Davis*, 31 Vt. 390; *Putnam v. Sullivan*, 4 Mass. 45; *Tucker v. Morrill*, 1 Allen, 528; 2 Pars. on Notes & Bills, 42; also, sec. 8, ch. 9, on Lost Notes & Bills; Story on Promissory Notes, sec. 191; *Phelen v. Moss*, 67 Penn., cited in 11 Am. Law Reg. 124. In this case, the right of the holder of a note, fraudulent as between the original parties, is discussed and authorities examined. The authorities cited by the defendant are from courts which seem to regard the equities of the defendant, in this class of cases, as embracing the first and controlling duty of the court, apparently forgetting that, in the eye of the law, negotiable paper is the representative of money, and is used in mercantile transactions as its substitute, and that any change from the well settled law, familiar alike to the courts and men of business, is little less serious in its results than a change in the currency of the country, and the laws affecting the same. The equities of the case are, however, by no means all on one side, for wherever there is a defendant who has been defrauded, there is a plaintiff who has honestly and in good faith, without notice, parted with an amount of money equal to the fraudulent claim; so that the rule of the law, after all, seems to rest in plain common sense, and it is only an admission that there are individual misfortunes which it does not attempt to remedy. Here the defendant was defrauded; for that the law should give him the fullest remedy against the wrong-doer; but why should he retrieve his misfortunes at the expense and damage of the plaintiffs, who have neither done, nor been privy to doing wrong? The plaintiffs have misfortunes enough of their own. The paper they purchased was the property which they became the owner of, without the violation either of legal enactments or good morals. And why should the misfortunes of the defendant be turned over to the plaintiffs more than to any other innocent party, more especially in this case, when the defendant's misfortune arises from his own negligent acts?—for, if one by his negligence effects a transaction whereby an innocent party suffers, the negligent party must bear the loss. *Ganard v. Hadden*, 67 Pa.; *Zim-*

*merman v. Rolfe*, 74 Pa., cited in 14 Am. Law Reg. 193. This principle is recognized in most of the cases cited in the defendant's brief; also in *Clark v. Whitaker*, 50 N. H. 474, and in a great variety of cases, many of which are cited in Shear. & Redf. on Neg. ch. 3, p. 227. As to the place of payment, undoubtedly, following the general rule, before the bank can recover upon the note, they must show a demand at the defendant's residence, or a sufficient excuse for not demanding payment there; but I say, — first, the exception was not properly taken, because nothing was claimed upon the point until after the hearing was closed and the case submitted and the parties had separated; and, secondly, this took place, not from any mistake or misapprehension on their part, but for the manifest reason that the defendant had called in at the bank, examined the note, and given notice to the cashier that he should not pay it. This ended all questions as to the necessity of any further demand. The reason for the demand no longer existed, and the law, therefore, did not impose the senseless and formal duty of again giving the defendant an opportunity to refuse to pay. *Stanley v. Stanley*, 2 N. H. 364; *Barker v. Barker*, N. H. 333. If any revision of the referee's finding on the question of negligence is to be had, I wish to be heard on the evidence, which is abundant and conclusive to sustain the report, and mostly in written and printed instruments.

LADD, J. The question, whether one who has been induced by fraudulent representations, without negligence on his part, to sign a promissory note or bill of exchange, supposing it to be a contract of an entirely different character, is liable on the note or bill to one who has purchased it in good faith for value, before due, has been considered within a few years in quite a number of the states; and the decisions seem to have been nearly uniform that he is not. Several of the cases holding this doctrine are referred to in the able brief furnished us by counsel for the defendant; and an examination of those cases shows, as it seems to me, that the doctrine stands on a very firm basis of reason and legal principle. The same question was decided in the same way by the English court of common pleas in 1869. *Foster v. Mackinnon*, Law Rep. 4 C. P. 704. That was an action by indorsee against indorser of a bill of exchange, of which the plaintiff became the holder before it became due, and without notice of any fraud. The defendant, who was a gentleman far advanced in years, was induced to put his name on the back of the bill by fraudulent representations, under the following circumstances: One Callow had been secretary to a company engaged in the formation of a railway, in which the defendant was interested, and the defendant had at some time previously, at Callow's request, signed a guaranty for £3,000, in order to enable the company to obtain an advance of money from their bankers. Callow took the bill in question to the defendant, and asked him to put his name on it, telling him it was a guaranty; whereupon the defendant, in the belief that he was signing a guaranty similar to that which he had before given and out of which no liability had resulted to him, put his signature on the back of the bill as indorser. Bovill, C. J., before whom the cause was tried at *nisi prius*, directed the jury that "if the defendant's signature to the document was obtained upon a fraudulent representation that it was a guaranty, and the defendant signed it without knowing it was a bill and



under the belief that it was a guaranty, and if he was not guilty of any negligence in so signing the paper, he was entitled to the verdict. The full bench held that this was a proper direction. Byles, J., who delivered the judgment of the court, in the course of his opinion (p. 711) says: "It seems plain, on principle and on authority, that if a blind man, or a man who cannot read, or who for some reason not implying negligence forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs, then, at least, the signature so obtained is of no force. And it is invalid, not merely on the ground of fraud where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and, therefore, in contemplation of law, never did sign the contract to which his name is appended."

I have seen but one case—*Douglass v. Matting*, 29 Iowa, 49—where the rule has been directly held the other way; and I should be prepared to dispose of this case by the application of a doctrine which appears to be so sensible and so well sustained by authority, if the facts found by the referee stopped here; but he found, in addition, that it was a negligent act on the part of the defendant to sign the note without ascertaining whether it was what the payee represented, or something else; and this, I think, puts a very different face upon the matter. That the defendant cannot be held by virtue of any actual contract or promise is very clear, because he never made any contract; but that he should be estopped by his own negligence from denying, as against an innocent holder for value, the usual legal effect of his signature to a negotiable instrument, or be discharged from liability for the proximate consequences to such innocent holder of his own negligent act, seems to be equally clear both upon reason and authority. See *Swan v. North British Co.* 7 H. & N. 603; *S. C.* in error, 2 H. & C. 175, and cases referred to.

But the defendant claims that the finding of negligence by the referee is wrong, and that his report ought to be revised in that particular by the court here. I do not think that can be done. The motion to recommit the report for the purpose of a further hearing on this point, or that the question of negligence be tried by jury, should be addressed to the circuit court. If the motion for a re-trial of the facts, either by the referee or a jury, should be denied in the circuit court, I am of opinion there must be judgment on the report for the plaintiff.

CUSHING, C. J. The case of *Putnam v. Sullivan*, 4 Mass. 45, is very much like the present. There the defendants, having occasion to be absent from home, had intrusted to their confidential clerk several blank papers with the name of the firm written upon them, to be filled up, some of them as notes signed by the firm, and others made payable to the firm, with the firm's indorsement upon them. One of these blanks was intended to be given to the promisor on the note in suit, but he by a fraudulent trick induced the clerk to give him more than one of these papers, and this note had been fraudulently made on one of them.

It was conceded that the plaintiffs were *bond fide* indorsees for value without notice. The case was ably argued, and judgment rendered for

the defendants by Parsons, C. J. The learned judge, in his opinion, says: "The counsel for the defendants agree, that, generally, an indorsement obtained by fraud shall hold the indorsers according to the terms of it; but they make a distinction between the cases where the indorser through fraudulent pretences has been induced to indorse the note he is called on to pay, and where he never intended to indorse a note of that description, but a different note, and for a different purpose.

"Perhaps there may be cases in which this distinction ought to prevail, — as, if a blind man had a note falsely and fraudulently read to him, and he indorsed it, supposing it to be the note read to him. But we are satisfied that an indorser cannot avail himself of this distinction, but in cases where he is not chargeable with any laches or neglect, or misplaced confidence in others. Here, one of two innocent parties must suffer. . . . The loss has been occasioned by the misplaced confidence of the indorsers in a clerk too young or too inexperienced to guard against the arts of the promisor."

In the present case, no fault is imputable to the plaintiff. It clearly stands in the position of a *bona fide* indorsee for value without notice.

I have nothing to add to the citation above made from the case of *Putnam v. Sullivan*. Of two innocent parties, he by whose negligence the loss has been occasioned must bear it.

It is interesting to remark that the law, as held to-day by the English court in the case cited by my brother Ladd, after the discussions of nearly three quarters of a century, stands exactly where the great American jurist left it.

SMITH, J. In *Lickbarrow v. Mason*, 2 Term, 70, Ashhurst, J., says: "We may lay it down as a broad principle, that whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." This rule is based in a sound legal principle, and commends itself to the good sense of every intelligent person. It has been long established by numerous authorities, both English and American, including several in this state, cited in the briefs of counsel. It further appears from the report of the referee that the plaintiff purchased the note in suit, before maturity, in good faith, and without notice of any defect. It further appears from the report, that it was a negligent act on the part of the defendant to sign the note, without ascertaining whether it was what the payee represented it to be. The defendant, then, having by his negligent act enabled another person to occasion a loss, he must sustain it. Unless the circuit court, for cause shown, shall recommit the report, the plaintiff is entitled to judgment on the report.

## SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1875.]

ADMIRALTY. — GENERAL AVERAGE. — WAGES AND PROVISIONS OF CREW DURING DETENTION FOR REPAIRS. — EXPENSES OF SPECIAL AGENT.

## HOBSON v. LORD.

Where a ship is necessarily delayed for repairs, the repairs having been rendered necessary by a peril of the sea and being required to enable the ship to proceed upon her voyage, although they are made in a port on the route of her regular voyage, the wages and provisions of her crew during the period of detention may be allowed as general average.

And the sum paid for services and expenses of a special agent sent to assist the ship in the port of distress may, also, be allowed.

IN error to the circuit court of the United States for the Southern District of New York.

Mr. Justice CLIFFORD delivered the opinion of the court.

Sacrifices, voluntarily made in the course of a voyage, of part of the ship or part of the cargo, to save the whole adventure from an impending sea peril, or extraordinary expenses incurred for the joint benefit of both ship and cargo, and which became necessary in consequence of a common peril of the kind, are regarded as the proper objects of general average.

Average, of the kind mentioned, denotes that contribution which is required to be made by all the parties to the same sea adventure, towards a loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, by some of the parties for the common benefit, to save the ship and cargo from an impending peril.

Property, not in peril requires no such sacrifice, nor that any extraordinary expense should be incurred; and property not saved from the impending peril is not required to pay any portion of such a loss or expenditure, nor do ordinary losses or expenditures entitle a party to claim any such contribution from the associated interests of the adventure; from which it follows that the ship and cargo must have been in peril, and that the sacrifice must have been of a part of the ship or cargo to save the residue of the adventure, or that the extraordinary expenses must have been incurred for the joint benefit of the ship and cargo, and which became necessary in consequence of a common peril.

Where there is no peril such a sacrifice presents no claim for such a contribution, but the greater and more imminent the peril, the more meritorious the claim against the other interests, if the sacrifice was voluntary, and contributed to save the adventure from the impending danger to which all the interests were exposed. *Star of Hope*, 9 Wall. 229; *Fowler v. Rathbone*, 12 Ib. 114; *McAndrews v. Thatcher*, 3 Ib. 370.

Expenses to a large amount were incurred by the plaintiff in repairing the ship *Lincoln*, of which he was the owner, during her voyage from one of the guano islands to Hampton Roads for orders. Her outward destina-

tion was to that island for a cargo, and she went there and received on board one thousand one hundred and ninety-two registered tons of guano, and sailed from the island on her return voyage.

Vessels loading there, if bound to the United States, are required to touch at Callao for a clearance in the homeward voyage. Clearances are not granted at the island, and she accordingly sailed for her return destination without one, intending to call at Callao for that purpose, but on the way she was badly injured by a collision with another vessel, and being in distress and unable to prosecute her voyage, by reason of such injuries, she proceeded to the port of Callao, which was her nearest port, and there came to anchor, in the anchorage where vessels usually anchor when they call at that port for a clearance.

Surveys of the ship were had, and it was found that she was so damaged by the collision that it was necessary to remove her cargo and repair the vessel before the voyage could be prosecuted; and it appears that it was necessary, in order to accomplish those objects, to remove the vessel from the place where she was anchored to another, a mile and a half nearer the mole or pier, to be repaired.

Heavily laden, as the ship was, the repairs could not be conveniently made without first unloading the larger portion of the cargo, and with that view the ship proceeded first to a hulk, at anchor a mile nearer the mole, and there discharged all of her cargo, except two hundred and fifty tons, before she went to the dock to be repaired. All the repairs ordered by the surveys were made, and it appears that all the steps taken to place the ship in the dock were judicious and necessary and proper to execute the required repairs. Extensive repairs were made, and the finding of the court shows that the repairs, though they were of a permanent character, were necessary to enable the ship to prosecute her voyage to its termination, and that the ship, when the repairs were completed, was removed from the dock, proceeded back to the hulk, was reloaded with the cargo previously discharged, except forty-five to fifty tons, and that she successfully completed her voyage to her port of destination, where the cargo was discharged and delivered to the defendants, who were the consignees of the cargo.

Service was made, and the defendants having appeared, the parties waived a jury and submitted the case to the circuit judge without a jury. Hearing was had and the court rendered judgment for the plaintiff in the sum of eighteen thousand four hundred and thirty dollars and forty-three cents. Immediate measures were adopted by the defendants to remove the cause into this court for reëxamination.

Errors are assigned as follows: (1.) That the circuit court improperly allowed the wages and provisions of the crew as general average during the period the ship was delayed for repairs. (2.) That the circuit court improperly allowed as general average the sum paid by the plaintiff for the services and expenses of the special agent sent to assist the vessel in the port of distress.

Matters of fact need not be discussed, as they are all agreed or are embraced in the special findings of the court. Safe arrival and delivery of the cargo are admitted, and it appears that the defendants, before the delivery of the cargo, gave to the plaintiff an average bond, in which they

promised and agreed to pay to the plaintiff their respective proportions of the expenses, charges, and sacrifice made or incurred by the plaintiff during the detention of the vessel for repairs, in consequence of damage received by a collision with another vessel while proceeding towards Callao for a clearance, payment to be made whenever and so soon as the average shall be adjusted conformably to law and the usages of the port of New York.

Most of the material matters of fact are embraced in the special findings of the court, as follows: That the ship, on her voyage to Callao for clearance and orders, was seriously damaged in consequence of the collision; that she reached the port where she was to touch in the damaged condition described in the surveys exhibited in the record; that she was in distress and unable to prosecute her voyage; that in consequence of the peril it was necessary that she should be unladen and be extensively repaired; that the repairs were necessary in order to enable her to prosecute her voyage, and that by means thereof the voyage was prosecuted; that the repairs were made and that the vessel was reloaded with reasonable dispatch; that by reason of her damaged condition she was compelled to leave her first anchorage ground, discharge her cargo at the hulk, about one mile from the place of her anchorage, and then to proceed to the dock for repairs, a half mile more distant from the anchorage than the hulk; that the services of the seamen employed during the repairs of the vessel were necessary for her preservation and safety and the prosecution of the voyage, and that the amount expended for their wages and provisions was a reasonable amount, and that the expenses and salary of the special agent sent to assist the ship at the port of distress are the subject of general average, according to the customs of the port of New York.

Expenses incurred of the character mentioned, or sacrifices made on account of all the associated interests by the owners of either, to save the adventure from a common peril, constitute the proper objects of general average, and the owners of the other interests are bound to make contribution for the same in the proportion of the value of their several interests, if it appears that the expenses or sacrifices were induced or occasioned by an impending peril, apparently imminent; that the expenses or sacrifices were of an extraordinary character; that they were voluntarily incurred or made, with a view to the general safety of the adventure, and that they accomplished or aided, at least, in the accomplishment of that purpose.

Claims of the kind have their foundation in equity, and rest upon the doctrine that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests which were exposed to the common peril, and which were saved from the common danger by the sacrifice.

Suppose that is so, still it is contended by the defendants that the expenses incurred for the wages and provisions of the crew, and the amount paid for the salary and expenses of the agent sent by the plaintiff to assist the ship in the port of distress, were improperly included in the adjustment. They object to the charge for wages and provisions for the crew, and insist that such a charge is never general average, except when the ship, in a proper case of imminent peril to vessel and cargo, or to the

voyage, voluntarily and to escape the peril, leaves the regular course of her voyage and bears away to a port of refuge for repairs; and they advance the theory that wages and provisions, during any other detention, though the ship may be disabled by perils of the sea, are not general average, because the expenses incurred, as they insist, are not given or sacrificed for the common benefit, but that they are bought and paid for by the freight stipulated for the voyage, and that the ship, in her delay for repairs, only complies with her contract made with the shipper.

Admit the proposition of the defendants, and it follows that a claim for general average can never be maintained in any case nor for any sacrifice or expenditure, unless the injured ship bears away and goes to a port of refuge, not in the course of her voyage. Ships going out or returning from an outward voyage are sometimes disabled by collision or storms in the outer harbor of the port of departure or of the return destination, and they are sometimes disabled in the course of the voyage in the outer harbor of the port where they are accustomed to call for funds or advice, or for wood, coal, provisions, or water; but if the rule of decision set up by the defendants should be adopted, no party in such a case can ever be entitled to maintain a suit for general average unless the ship bears away and goes to some other port, as a port of refuge for repairs, not even if she was voluntarily stranded to escape a much greater peril, and thereby became unable to move in any direction whatever.

Such a rule of decision is wholly inadmissible, as in many cases it would divest the claim of much or all of its equity, and make it depend upon an act entirely unimportant and wholly unnecessary. Navigators whose ship is injured by collision or perils of the sea should bear away to a port of refuge for repairs whenever the circumstances require it; but it would be a mere act of folly to do so in a case where the disaster to the ship happened in the harbor of a port where the necessary repairs could be as conveniently and economically executed as in a more distant port, out of the regular course of the voyage.

Both commercial usage and law allow compensation for such a voluntary sacrifice or extraordinary expenditure, not because the ship at the time bore away to a port of refuge outside of the course of her voyage, but because she was *interrupted* in the course of her voyage by the disaster, and because common justice dictates that where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the imminent danger, or incurs extraordinary expenses to promote the general safety of the associated interests, the sacrifice or expenses so made or incurred shall be assessed upon all in proportion to the share of each in the adventure.

Property at sea, as all experience shows, is often exposed to imminent perils, arising from collision and fire, as well as from the violence of the wind and waves. Navigation at best is a perilous pursuit, and all those who follow it know full well that the owners of ships and cargoes frequently suffer disastrous losses in spite of every safeguard and precaution which they can adopt. Equitable rules and regulations designed to avert the consequences likely to ensue from such perils, or to ameliorate the loss in case of disaster, have long been known in the jurisprudence of commercial countries, which, being founded in the principles of equity,

are entitled to be administered in the same spirit in which they had their origin.

Marine insurance is a system of that sort, and it had its origin as a measure to afford partial indemnity to the unfortunate for losses by such disasters. Allowances for salvage service are of a similar character, and the rule of proportionate contribution for sacrifices made to escape from an imminent sea peril or extraordinary expenses incurred for that purpose is one of equal merit and importance.

Where the disaster occurs in the course of the voyage, and the ship is disabled, the necessary expenses to refit her to go forward create an equity to support such a claim, just as strong as a sacrifice made to escape such a peril, if it appears that the cargo was saved, and that the expenses incurred enabled the master to prosecute the voyage to a successful termination. Contribution is enforced in such a case, not because the ship when injured bore away to a port outside of the regular course of the voyage, but because the principles of equity, common justice, and the usages of commerce require that what is given by one of the associated interests "for the benefit of all shall be made good by the proportionate contribution of all." *McAndrews v. Thatcher*, 3 Wall. 367; *Barnard v. Adams*, 10 How. 270. 2 Arnould on Ins. 784.

Equity requires that in such a case those whose effects have been preserved, by the sacrifice or extraordinary expenditure of the others, shall contribute to such voluntary sacrifice or expenditure; and commercial policy as well as equity favors the principle of proportionate contribution, as it encourages the owner, if present, to consent that his property, or some portion of it, may be cast away or exposed to peculiar and special danger to save the adventure and the lives of those on board from impending destruction. Such an owner, under such circumstances, has a lien upon the property saved from the imminent peril, to enforce the payment of the proportionate contribution for the sacrifice made or the extraordinary expenses incurred.

Proper repairs were made in this case, and the ship having been refitted and reloaded prosecuted her voyage to its termination. Safe arrival, with the cargo on board, is admitted, and it appears that the owner of the ship demanded the payment of the proportionate contribution before delivering the cargo, and that the defendants, in order to obtain such delivery, gave the plaintiff the average bond exhibited in the record. Enough appears in the terms of the bond to show that the defendants did not controvert the right of the plaintiff to claim a proportionate contribution. Instead of that, the recital admits the collision; that the ship sustained damages which made it necessary to discharge the cargo and refit; that sundry expenses and charges were incurred, and that various sacrifices were made which are the subject of a general average, and which should be borne by the property at risk as a common charge in contribution.

Nothing could be more explicit than the language of that recital, and the defendants promise and agree to pay the plaintiffs whatever sums may be found due from them for their proportion of such expenses, charges, and sacrifices as have arisen in consequence of the disaster, whenever and so soon as the average shall be adjusted conformably to law and the usages of the port of New York.

They admit the disaster ; that sacrifices and expenses were made and incurred ; that the sacrifices and expenses are the subject of general average, and promise and agree to pay the proportionate contribution so soon as the same shall be adjusted conformably to law and the usages of the port where the voyage ended. Plainly they admit that there is no merit in the present defence, for if it be true that such a claim cannot arise unless the vessel bears away to a port of refuge outside of the regular course of her voyage, then it follows that the plaintiff is not entitled to recover anything. Inconsistencies of the kind cannot be overlooked in such an investigation, as they tend very strongly to show that the defence is unsound, both in law and fact.

Judgment was rendered in this case for the plaintiff, and it is now admitted that the judgment is correct, for the sum of fourteen thousand and seventy-five dollars and seventy-five cents, including interest, whereas if the defence set up to the two sums in controversy is a valid defence, the plaintiff is not entitled to any contribution whatever. Expenses during the interruption of the voyage, incurred by the master for the wages of the officers and crew, to the amount of three thousand nine hundred and seventeen dollars and eighteen cents, were also allowed by the circuit court and were included in the judgment, and those expenses, in the judgment of the court, are just as proper as the charge for the expenses of unloading and reloading the cargo, which, it is admitted, is a proper charge.

Temporary repairs of damages arising from extraordinary perils of the sea, made at some intermediate port, for the purpose of prosecuting the voyage, if the damage to the ship was of a character to disable her and to interrupt the voyage, are the proper object of general average. Phillips on Ins. 5th ed. sec. 1300.

Repairs in such cases, if necessary to remove the disability of the ship to proceed on her voyage, are now everywhere regarded as the proper object of proportionate contribution ; but expenses incurred for repairs, beyond what is reasonably necessary for that purpose, are not so regarded, because it is the duty of the owners, except in case of disaster, to keep the ship in a seaworthy condition. *Fowler v. Rathbone*, 12 Wall. 117 ; *Star of Hope*, 9 Ib. 236.

Sea perils which result in damage to the ship to such an extent as to interrupt the voyage and disable her from pursuing it, necessarily involve delay and extraordinary expenses, and this court held, in the case last cited, that the wages and provisions of the officers and crew in such a case are general average, from the time the disaster occurs until the ship resumes her voyage, unless it appears that proper diligence was not used in making the repairs.

Necessary repairs to the ship, except to the extent that such repairs are required to replace such parts of the ship as were sacrificed to save the associated interests, or to refit the ship to enable her safely to resume the voyage, are not to be included as general average by the adjuster ; but the wages and provisions of the officers and crew during the consequent and necessary interruption of the voyage, occasioned by the disaster, are a proper charge for such proportionate contribution, wholly irrespective of the question whether the ship bore away for repairs to a port of ref-



uge outside of the regular course of the voyage, or whether the necessary repairs were executed in the port where the disaster occurred. Masters may well consult convenience and economy in selecting the port for making repairs; and if in the particular case the master exercises good judgment in making the selection, no interested party will have any right to complain.

Argument to show that the services of the crew were necessary, during the period the voyage was interrupted, is quite unnecessary, as the findings of the court dispose of that question in the affirmative, from which finding it appears that as many men as were employed on board were actually necessary for the safety of the ship, in hauling her to and from the hulk on surf days, and in moving the ship while in dock during the repairs. Apart from that, the court also finds that it was necessary that the men employed should be sailors, able to haul the ship out at any moment when there was surf, and that the services of the sailors employed during the repairs of the vessel were necessary for her preservation and safety, and to refit her for the prosecution of the voyage.

Where the disaster occurs in the open ocean, away from any port where repairs can conveniently be made, it often becomes necessary that the ship shall bear away to a port of refuge, more or less distant from the usual course of her voyage, and it is unquestionably correct to say that the deviation in such a case is justifiable. Reported cases of the kind are quite numerous, and courts of justice, in disposing of such controversies, not infrequently refer to the bearing away of the ship as *marking the time* from which to compute the extraordinary expenses incurred in refitting the ship to prosecute the voyage. Examples of the kind are found in the decisions of this court, of which one of a striking character may be mentioned, where the court say that the wages and provisions of the master, officers, and crew are general average from the time of putting away for the port of succor, and every expense necessarily incurred for the benefit of all concerned during the detention. *Star of Hope*, 9 Wall. 236.

Reference to the bearing away of the ship is there made solely to *mark the time* when the expenses commenced to be general average, as is obvious from the fact that the court proceed to decide, in the same opinion, that wages and provisions in such a case "are general average from the time the disaster occurs until the ship resumes her voyage," which is the true rule upon the subject, if proper diligence is employed in making the repairs. Numerous examples of the kind might be given, but it is unnecessary, as there is no well-considered case where it is held that sacrifices made by one of the associated interests for the benefit of ship, cargo, and freight, to escape an imminent sea peril, or that extraordinary expenses incurred by one of the interests in such a case for the benefit of all, to refit the ship if disabled to prosecute the voyage, are not the proper objects of general average, unless the ship bore away to a port of refuge outside the usual course of her voyage.

Decided cases are referred to by the defendants, which they insist support that proposition, but the court here, after having examined each one of the cases, is entirely of a different opinion. Even the case of *Potter*

v. *Ins. Co.* 3 Sum. 38, does not sustain the theory of the defendants. In that case the voyage was from New Orleans to Tampico, and it appearing that the repairs could not be made at the port of destination, if the vessel should proceed there, the ship put back to the port of departure, but the case warrants the conclusion that the result would have been the same, if the vessel had gone forward and been repaired in the port of destination.

Average contribution in such cases is allowed to the party making such sacrifice or incurring such extraordinary expenses, as a measure of justice for a meritorious service, to distribute among all who were benefited by it a due proportion of what was sacrificed or expended, the principle being that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests which were exposed to the common peril and which were saved from the common danger by the sacrifice.

Peculiar remedies, equitable in their nature, are given to persons engaged in navigation and marine adventures, for the reason that such pursuits are exposed to extreme dangers and stand in need of such peculiar and equitable remedies. Contracts of marine insurance are enforced to indemnify the owner of such an adventure from a portion of his loss. Services of salvors are liberally rewarded to encourage the hardy mariners to encounter such risks to save the property invested in such an adventure from complete destruction.

Proportionate contribution is enforced by courts of justice, in cases like the present, not because the ship bore away from the course of her voyage, but because common justice requires that sacrifices made and expenses incurred by one of the associated interests for the benefit of all should be borne by all, in due proportion to the interests saved by the sacrifice or expenditure.

Contributions of the kind for expenses incurred to pay for wages and provisions of the crew, except in a very limited class of cases, are not enforced in the courts of the parent country. Their decisions in that regard, therefore, are not applicable to the present question, but in all other respects the rule of decision in the two countries is substantially the same. Such a condition to the right of recovery as that set up by the defendants finds no support in any reported decision in the tribunals of that country. *Moran v. Jones*, 7 Ell. & Bl. 532.

It appears in that case that the voyage was from Liverpool to Callao for a cargo of guano, and that the ship was driven on a bank by a storm, near the port of departure; that her cargo was discharged and transported back whence it came; that the ship was subsequently got off and taken back to the port from which she departed, and there repaired, when she was reloaded with her cargo and proceeded on her voyage. Attempt was made in that case to maintain that the cargo was not liable to contribute in general average, because it was separated from the ship before she was got off, but the whole court, Campbell, C. J., giving the opinion, held that the saving of the ship and the cargo was one continued transaction, and that the expenses incurred were general average, to which the ship, freight, and cargo must contribute.

Most of the expenses in that case were incurred in getting the ship off

the bank, and the rest were incurred in the port of departure, and it never occurred to court or counsel that the plaintiff could not recover because the ship did not bear away to a port of refuge. *Ins. Co. v. Parker*, 2 Pick. 8; *Merithew v. Sampson*, 4 Allen, 194; *Patten v. Darling*, 1 Cliff. 262.

Exactly the same rule was laid down in the court of appeals of the State of New York. *Nelson v. Belmont*, 21 N. Y. 38. Various questions were considered in that case, but the court laid down the rule that where the expenses are incurred or the sacrifices voluntarily made for the safety of the ship, freight, and cargo, a general average will take place, provided the purpose of the sacrifice or expense is accomplished.

Such a cause of action, says Kent, "grows out of the incidents of a mercantile voyage;" and he adds that the duties which it creates apply equally to the owners of the ship and of the cargo, and he characterizes it as a contribution made by all parties concerned, towards a loss sustained by some of the parties in interest, for the benefit of all; and he remarks that it is called general average because it falls upon the gross amount of ship, cargo, and freight.

Ship, cargo, and freight are undoubtedly required to contribute in such a case, and the same learned author holds that the wages and provisions of the crew, if the ship is obliged to go into port to refit, constitute the subject of general average during the detention; which, beyond all doubt, is the settled rule of the courts in this country, state and federal. *Barnard v. Adams*, 10 How. 307; 3 Kent Com. 12th ed. 235; *Barker v. Railroad*, 22 Ohio St. 62; *Lyon v. Alford*, 18 Conn. 75; *Nimick v. Holmes*, 25 Penn. St. 373; *Emerigon*, 482; *Hallet v. Wigram*, 6 C. B. 603; *Dilworth v. McKelvy*, 30 Missouri, 155; *Abbott on Ship*. 497; *Hathaway v. Ins. Co.* 8 Bosw. 59.

Maritime usage everywhere is that the port of destination or delivery of the cargo is the port where the average is to be adjusted. 4 Phil. Int. Leg. 641; *Simonds v. White*, 2 B. & C. 811; *Pars. on Con.* 6th ed. 332; *Dogleigh v. Davidson*, 5 Dowl. & R. 6; *McLoon v. Cummings*, 73 Penn. St. 108.

Universal usage designates the port of New York as the place where the adjustment should have been made, and inasmuch as the parties so agreed in the average bond, further remarks upon the subject are quite unnecessary; and the court is of the opinion that expenses incurred for the wages and provisions of the crew were properly included in the average adjustment.

Discussion of the second objection to the adjustment is not necessary, as the defendants are concluded by the finding of the circuit court. Among other things the circuit court found that, when the owner of the ship sends out an agent to a foreign port, into which the ship has put in distress, to advise and assist the master, for the benefit of ship and cargo, the usage of the port of New York is that the amount paid for the services of such agent, and his board and travelling and incidental expenses, are allowed in general average, without regard to the question whether or not he reaches the port of distress in time actually to render service, provided he is sent out in good faith, with the intention that he shall render service for the general benefit. It appearing that the adjustment

was made in conformity to the usage of the port in that regard, the court is of the opinion that the charge was properly allowed, and that there is no error in the record.

*Judgment affirmed.*

Mr. Justice BRADLEY, dissenting. I dissent from the judgment of the court in this case. It seems to me a dangerous precedent to allow contribution of the crew's wages when a ship does not deviate from her course, but is merely delayed for repairs on the route of her regular voyage. Such claims will too often be put forward, and a shipper will never know when he has done paying freight for the transportation of his property. I concede that the American rule is more liberal in this respect than the English, but I think it has never been carried so far as the present case.

## SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1875.]

TAXATION OF CAPITAL STOCK OF CORPORATIONS. — WHEN THE COLLECTION OF A TAX WILL BE ENJOINED.

TAYLOR, *Collector*, v. SECOR *et al.*

MILLER, *Collector*, v. JESSUP *et al.*

LIEB, *Clerk*, *et al.* v. KIDDER *et al.*

1. While this court does not lay down any absolute rule limiting the powers of a court of equity in restraining the collection of taxes, it declares that it is essential that every case be brought within some of the recognized rules of equity jurisdiction, and that neither illegality or irregularity in the proceedings, nor error or excess in the valuation, nor the hardship or injustice of the law, provided it be constitutional, nor any grievance which can be remedied by a suit at law, either before or after the payment of the tax, will authorize an injunction against its collection.
2. This rule is founded on the principle that the levy of taxes is a legislative and not a judicial function, and the court can neither make nor cause to be made a new assessment if the one complained of be erroneous, and also in the necessity that the taxes, without which the state could not exist, should be regularly and promptly paid into its treasury.
3. *Quere*: Whether the same rigid rule against equitable relief would apply to taxes levied solely by municipal corporations for corporate purposes as that here applied to state taxes? Probably not.
4. No injunction, preliminary or final, can be granted to stay collection of taxes until it is shown that all the taxes conceded to be due, or which the court can see ought to be paid, or which can be shown to be due by affidavits, have been paid or tendered without demanding a receipt in full.
5. While the Constitution of Illinois requires taxation, in general, to be uniform and equal, it declares, in express terms, that a large class of persons engaged in special pursuits, among whom are persons or corporations owning franchises and privileges, may be taxed as the legislature shall determine, by a general law, *uniform as to the class upon which it operates*, and under this provision a statute is not unconstitutional which prescribes a different rule of taxation for railroad companies from that for individuals.
6. Nor does it violate any provision of the Constitution of the United States.
7. The capital stock, franchises, and all the real and personal property of corporations are justly liable to taxation, and a rule which ascertains the value of all this by ascer-

- taining the cash value of the funded debt and of the shares of the capital stock as the basis of assessment, is probably as fair as any other.
8. Deducting from this the assessed value of all the tangible real and personal property which is also taxed, leaves the real value of the capital stock and franchise subject to taxation as justly as any other mode, all modes being more or less imperfect.
  9. It is neither in conflict with the Constitution of Illinois nor inequitable that the entire taxable property of the railroad company should be ascertained by the state board of equalization, and that the state, county, and city taxes should be collected within each municipality on this assessment, in the proportion which the length of the road within such municipality bears to the whole length of the road within the state.
  10. The action of the board of equalization in increasing the assessed value of the property of a railroad company or an individual, above the return made to the board, does not require a notice to the party to make it valid, and the courts cannot substitute their judgment as to such valuation for that of the board.
  11. The supreme court of the State of Illinois having decided that the law complained of in these cases is valid under her Constitution, and having construed the statute, this court adopts the decision of that court as a rule to be followed in the federal courts.

MR. JUSTICE MILLER delivered the opinion of the court.

The three cases, whose titles stand at the head of this opinion, are all appeals from decrees of the circuit court for the Northern District of Illinois, enjoining the appellants from the collection of taxes assessed by the proper officers of the State of Illinois against three several railroad companies, organized under the laws of that state, and doing business in it. The plaintiffs, in the first named of the above suits, are mortgagees of the Toledo, Peoria, and Warsaw Railroad Company. In the other two cases the complainants are stockholders of the respective companies whose interests they represent, namely, the Chicago and Alton Railroad Company, in No. 701, and the Chicago, Burlington, and Quincy Railroad Company, in No. 703.

The act of the Legislature of Illinois of March 30, 1872, under which the taxes complained of were assessed, makes special provisions for the taxation of railroads and other corporations, the main feature of which is the purpose of leaving to each county, city, and town the power of assessing for taxation what is properly local in the same manner that other similar property is taxed in that municipality, and at the same time to subject to like taxation on some fair basis that which is not in its nature so clearly local, but which, by reason of its being appurtenant or incident to the railroad, should pay its share to the state, to all the counties, towns, and cities through which any part of the road runs. The theory of the system is manifestly to treat the railroad track, its rolling stock, its franchise, and its capital as a unit for taxation, and to distribute the assessed value of this unit according as the length of the road in each county, city, and town bears to the whole length of the road.

It provides, therefore, for three separate valuations:—

1. Of the real estate in each county, city, and town, which is not a part of the track and right of way, and of the personal property, such as tools, implements, &c., which remain permanently at that locality. These are valued by the local assessor and taxed by the local authorities in precisely the same manner that other real and personal property is assessed and taxed.
2. The railroad track, including the right of way, the grading, and

superstructure, and such depots, buildings, and other improvements as are on it, and all the rolling stock and other personal property not local.

The entire value of this, owned by any company in the state, is ascertained by a report made by the proper officer of the railroad company, submitted to a state board of equalization, which fixes this value finally, and each county, city, and town taxes the company on so much of this assessment as the length of the track within that locality bears to the whole length of the track assessed by the board.

These two subjects of assessment are by the statute called the tangible property of the company.

It is obvious, however, that while a fair assessment under these two descriptions of property will include all the visible or tangible property of the corporation, it may or may not include all its wealth. There may be other property of a class not visible or tangible which ought to respond to taxation, and which the state has a right to subject to taxation. Thus it may occur, as in fact is claimed by one of these companies, that, being insolvent, and its earnings not being sufficient to pay anything beyond its necessary expenses for operating the road and its repairs, that this tangible property represents more than the real wealth of the company and its property. While on the other hand another one of these companies is so rich that, after paying its expenses and interest on a large amount of debt, it declares large dividends, and this interest and these dividends, when looked to in reference to what is called the tangible property, show that there is here another element of wealth which ought to pay its share of the taxes.

3. This element the State of Illinois calls the value of the franchise and capital stock of the corporation, — the value of the right to use this tangible property for purposes of gain. And this constitutes the third valuation, which is likewise to be made by the board of equalization, and which, when thus ascertained, is subjected to the taxation of the state, and the counties, towns, and cities, by the same rule that the value of the road-bed is, namely, according to the length of the track in each taxing locality. The word capital stock, as here used, does not mean the shares of the stock, but the aggregate capital of the company. This is obvious from the proviso to the fourth paragraph of section three of the revenue law. As this paragraph lies at the basis of these controversies, it is here given verbatim : —

“The capital stock of all companies and associations, now or hereafter created under the laws of this state, shall be so valued by the state board of equalization as to ascertain and to determine, respectively, the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association. Said board shall adopt such rules and principles for ascertaining the fair cash value of such capital stock as to it may seem equitable and just ; and such rules and principles, when so adopted, if not inconsistent with this act, shall be as binding and of the same effect as if contained in this act, — subject, however, to such change, alteration, or amendment as may be found, from time to time, to be necessary, by said board : *Provided*, that in all cases where the tangible property or capital stock of any company or association is assessed under this act, the shares of capital stock of any such company or association shall not be assessed or taxed in this state.

This clause shall not apply to the capital stock or shares of capital stock of banks organized under the general banking laws of this state."

That the franchise, capital stock, business, and profits of all corporations are liable to taxation in the place where they do business, and by the state which creates them, admits of no dispute at this day. "Nothing can be more certain in legal decisions," says this court, in *Society for Savings v. Coite*, 6 Wall. 607, "than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a state for the support of a state government." *State Freight Tax Case*, 15 Wall. 232; *State Tax on Gross Receipts*, 15 Wall. 284. But it has been a desideratum, perhaps not yet fully attained, to find a method of taxing this species of property which will be at the same time just to the owners of it, equal and fair in its relations to taxes or other property, and which will enforce the just contribution that such property should pay for the benefits which, more than property generally, it receives at the hands of government.

The tax on the deposits of savings banks, in *Savings Bank v. Coite*, was held to be of this class by the court; the tax on freight, in the *Freight Tax Cases*, and the tax on gross receipts, in the other cases by the State of Pennsylvania, are all attempts at arriving at the desired result in the best mode.

The statute of Illinois and the rule adopted by the board of equalization, under the power conferred by the clause we have just recited, may not be the wisest mode of doing complete justice in this difficult matter; but we confess we have on the whole seen no scheme which is better calculated to effect the purpose, so far as railroad corporations are concerned, of taxing at once all their property and of making the tax just and equal in its relation to other taxable property of the state.

The rule adopted by the board is as follows:—

"*First*. The market or fair cash value of the shares of capital stock, and the market or fair cash value of the debt (excluding from such debt the indebtedness for current expenses) shall be combined or added together; and the aggregate amount so ascertained shall be taken and held to be the fair cash value of the capital stock, including the franchise, respectively, of such companies and associations.

"*Second*. From the aggregate amount ascertained as aforesaid, there shall be deducted the aggregate amount of the equalized or assessed valuation of all the tangible property, respectively, of such companies and associations (such equalized or assessed valuation being taken, in each case, as the same may be determined by the equalization or assessment of property by this board), and the amount remaining, in each case, if any, shall be taken and held to be the amount and fair cash value of the capital stock, including the franchise, which this board is required by law to assess, respectively, against companies and associations now or hereafter created under the laws of this state."

It may be assumed for all practical purposes, and it is perhaps absolutely true, that every railroad company in Illinois has a bonded indebtedness secured by one or more mortgages. The parties who deal in such bonds are generally keen and far-sighted men, and most careful in their investments. Hence the value which these securities hold in market is

one of the surest criterias, as far as it goes, of the value of the road as a security for the payment of those bonds.

These mortgages are, however, liens on the road, and, taking precedence of the shares of the stockholder, they may or may not extinguish the value of his shares. They must in any event affect that value to the exact amount of the aggregate debts. For all that goes to pay that debt and its interest diminishes *pro tanto* the dividend of the shareholder and the value of his share.

It is, therefore, obvious that when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises, for these are all represented by the value of its bonded debt and of the shares of its capital stock.

This would of itself be, perhaps, the fairest basis of taxation for the state at large, if all railroads were solvent and paid the interest promptly on their funded debt. But this has never been the case in Illinois, and it is doubtful if this happy state of affairs is likely to prevail soon in that or any other state of the Union. If taxes were assessable alone on the value of the capital stock and franchises of the corporation, cases might be found where these were worth nothing, and such companies would pay no tax even for their real estate and personal property. And this is precisely the main argument of counsel for the Toledo, Peoria, and Warsaw Railroad Company in opposition to the law and to the rule of the board of equalization. But individuals do not escape taxation on their real and personal property because they are insolvent. In several of the states many men in effect pay tax on their lots or lands, and on the mortgage which covers them and exceeds them in value, and on a large amount of personal property, while the mortgage debt exceeds in amount all that they are worth in the world. No state has ventured to establish the principle of permitting its visible, tangible property to escape taxation, relying solely on a tax imposed on the individual on the basis of his estimated wealth in excess of his debts.

The system adopted by the statute of Illinois, and the rule of the board of equalization, preserve this principle of taxing all the tangible property at its value, and taxing the capital stock and franchise at their value, if there be any after deducting the value of the tangible property. The case of the Toledo, Peoria, and Warsaw Company, as we have said, is used as an illustration of the inequality which this rule works, and which counsel say is forbidden by the Constitution of the state, thus rendering the tax assessed against it void. That company is insolvent and in the hands of a receiver. It is unable to pay any interest on its bonds. Its capital stock is of no value. But the board of equalization assessed the capital stock and franchise at \$2,008,415, and its tangible property at \$2,629,367, thus assessing a property which pays but little, if anything, beyond its running expenses, at the sum of \$4,632,782.

This sounds plausible, but it is nothing more. Concede for the present that the capital stock is sunk and is of no value; concede that the funded debt of the company has at present no market value, or is unsalable, there remains what is valued or worth over \$2,600,000 of real and personal



property, which, like all other property of individuals or corporations, ought to pay its proportion of the public burdens. There also remains the value of the franchise, which is not destroyed by the circumstance that the road does not pay interest on its debt. Does anybody believe that this debt is of no value — that the holders of it attach no value to this franchise? Are they willing to give up the right to operate the road to receive freights and fares, to endeavor to make it pay something more than the mere value of the personal property of the track, the depots, the grounds, the rolling stock, and other tangible property? Is it supposed by any one that they intend or will sell these separately or apart from the right to use them as a railroad? Why do not the bondholders sell all these things under their mortgage at auction, as a man would sell town lots and household furniture, and horses and carriages? The reason is too clear to escape observation. It is because in the case of the railroad there is attached to all this property and goes with it a privilege, a right to use it through the whole extent of the richest counties of Illinois, in transporting persons and property, in a manner which adds immensely to its value when considered as so much iron, so much land, and so much personal property. By virtue of this privilege or franchise, this is all aggregated into a unit, well adapted to make money by its use in that way, with a chartered right to use it for that purpose.

It is this *franchise* which the Legislature of Illinois intended to tax, which it had a right to tax, and in taxing it committed no injustice, if it was fairly assessed, though the corporation which holds it may be so utterly bankrupt that it must necessarily pass from it into other hands. In those hands, disembarassed of its overweight of debt, who shall say that it is not worth \$2,000,000, and who shall say that such is not the real value now of this franchise?

We shall presently consider the extent to which a court of justice can enter upon the consideration of this question; but we take occasion here to say that, in the view we have taken of the matter, there is no sufficient evidence in these cases to show that if the rule adopted by the board be just, that it has been unfairly applied to any of these roads, except in the single case of a mistake in the amount of the bonds of the Chicago, Burlington and Quincy Railroad Company, — a mistake induced by the report of that company's officer to the state auditor.

Another objection to the system of taxation by the state is, that the rolling stock, capital stock, and franchise are personal property, and that this, with all other personal property, has a local *situs* at the principal place of business of the corporation, and can be taxed by no other county, city, or town, but the one where it is so situated.

This objection is based upon the general rule of law that personal property, as to its *situs*, follows the domicile of its owner. It may be doubted very reasonably whether such a rule can be applied to a railroad corporation, as between the different localities embraced by its line of road. But, after all, the rule is merely the law of the state which recognizes it, and when it is called into operation as to property located in one state and owned by a resident of another, it is a rule of comity in the former state rather than an absolute principle in all cases. *Green v. Van Buskirk*, 5 Wall. 312. Like all other laws of a state, it is, therefore, subject to leg-

islative repeal, modification, or limitation; and when the Legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation. Whether allowing the rule to stand as to taxation of individuals, and changing it as to railroads or other corporations, it violated any rule of uniformity prescribed by the Constitution of the state, we will consider when we come to the constitutional objections to the statute.

It is further objected that the railroad track, capital stock, and franchise is not assessed in each county where it lies according to its value there, but according to an aggregate value of the whole, in which each county, city, and town collects taxes according to the length of the track within its limits.

This, it is said, works injustice both to the counties and to the companies. To the counties and cities, by depriving them of the benefit of this value as a basis of local taxation. To the company, by subjecting its track and franchises, on the basis of this general value, to the taxation of the counties and towns, varying, as they do, in rate, without the benefit of the rule of assessment which prevails in those counties in the valuation of other and similar property. But, as we have already said, a railroad must be regarded for many, indeed for most purposes, as a unit. The track of the road is but one track from one end of it to the other, and, except in its use as one track, is of little value. In this track, as a whole, each county through which it passes has an interest much more important than it has in the limited part of it lying within its boundary. Destroy, by any means, a few miles of this track within an interior county, so as to cut off the connection between the two parts thus separated, and if it could not be repaired or replaced, its effect upon the value of the remainder of the road is out of all proportion to the mere local value of the part of it destroyed. A similar effect on the value of the interior of the road would follow the destruction of that end of the road lying in Chicago, or some other place where its largest traffic centres. It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole.

There are other objections urged by counsel against the equity and fairness of the Illinois mode of assessing and taxing railroad companies as a system. But we cannot notice them all. Those above commented on are the most important.

There is however an objection urged to the conduct of the board of equalization, resting on the action of the board in these particular cases, in which they are charged with a gross violation of the law to the prejudice of the corporations, which we will consider.

The statute requires the proper officers of the railroad companies to furnish to the state auditor a schedule of the various elements already mentioned as necessary in applying the statutory rule of valuation. It is charged that the board of equalization increased the estimates of value so reported to the auditor, without notice to the companies, and without sufficient evidence that it ought to be done, and it is strenuously urged upon us that for want of this notice the whole assessment of the property and levy of taxes is void.

It is hard to believe that such a proposition can be seriously made. If the increased valuation of property by the board without notice is void as to the railroad companies, it must be equally void as to every other owner of property in the state, when the value assessed upon it by the local assessor has been increased by the board of equalization. How much tax would thus be rendered void it is impossible to say. The main function of this board is to equalize these assessments over the whole state. If they find that a county has had its property assessed too high in reference to the general standard, they may reduce its valuation; if it has been fixed too low, they raise it to that standard. When they raise it in any county, they necessarily raise it on the property of every individual who owns any in that county. Must each one of them have notice and a separate hearing? If a railroad company is by law entitled to such notice, surely every individual is equally entitled to it. Yet if this be so, the expense of giving notice, the delay of hearing each individual, would render the exercise of the main function of this board impossible. The very moment you come to apply to the individual the right claimed by the corporation in this case, its absurdity is apparent. Nor is there any hardship in the matter. This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or resent a wrong, and in the business of assessing taxes, this is all that can be reasonably asked.

As we do not know on what evidence the board acted in regard to these railroads, or whether they did not act on knowledge which they possessed themselves, and as all valuation of property is more or less matter of opinion, we see no reason why the opinion of this court, or of the circuit court, should be better, or should be substituted for that of the board, whose opinion the law has declared to be the one to govern in the matter.

It is said that the statute of Illinois is void, because it violates the principles of uniformity, and taxes corporations in a manner different from that which governs taxation of individuals.

The sections of the Constitution relied on in support of this proposition are sections one and ten of article nine, which are as follows: —

Sect. 1. "The general assembly shall provide such revenue as may be needful by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property; such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, liquor dealers, toll-bridges, ferries, insurance, telegraph, and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall, from time to time, direct by general law, uniform as to the class upon which it operates."

Sect. 10. "The general assembly shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes, but shall require that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted

under authority of law, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

As regards this latter section, there is no claim that *the rate* of taxation levied by any municipal corporation on the assessed value of railroad property within its limits is greater than on other property.

Nor is it asserted that the valuation of that part of the property which the statute regards as strictly local, namely, real estate not a part of the track, and tools and implements used exclusively within the locality, has been assessed on any other principle than that which is applied to the property of individuals.

But the contention is that the rule of treating the road, its rolling stock, and franchises as a unit, and assessing it as a whole, on which each municipality levies its taxes according to the length of the road within its limits, violates the principles of this section. We have already discussed this question, and are of opinion that taxes assessed by that rule on the railroad property by the municipality are uniform when the rate of taxation is the same on the assessment thus ascertained that it is on other property.

This court has expressly held in two cases, where the road of a corporation ran through different states, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each state, as the basis of taxation. *The Delaware Railroad Tax Case*, 18 Wall. 208; *Erie R. R. Co. v. Pennsylvania*, 21 Wall. 492.

As to section one, we need not inquire very closely whether the mode adopted by the statute and the rules of the board of equalization produces a valuation for railroad companies different from that of individuals, though, as we have already said, it does not appear to us to produce any inequality to the prejudice of the companies. But we need not pursue that inquiry very closely, because the latter part of the section in express terms authorizes the legislature to "tax persons and corporations owning or using franchises, in such manner as it shall from time to time direct, by general law," and the only restriction on the power, as applied to this class, is that it shall be "uniform as to the class upon which it operates."

There can be no doubt that all the classes named in this clause, including peddlers, showmen, innkeepers, ferries, express, insurance, and telegraph companies, are taken out of the general rule of uniformity prescribed by the first clause, and the only limitation as to them is that of uniformity as to the class upon which the law shall operate. That is, innkeepers may be taxed by one rule, ferries by another, railroads by another, provided that the rule as to innkeepers be uniform as to all innkeepers, the rule as to ferries uniform as to all ferries, and the rule as to railroad companies be uniform as to all railroad companies. As we have seen, no evidence that the rule by which railroad property is taxed is not uniform in its action on all the railroad companies of Illinois, we can perceive no opposition to the Constitution of the state in that rule.

But suppose it were otherwise; perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized. It must be admitted that the system which most nearly attains this is the best. But the

most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens, in all the localities of a large state like Illinois, the application being made by men whose judgments and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature and of the evidence on which human judgment is founded. *Tappan v. Merchants' National Bank*, 19 Wall. 504; *Weber v. Renhard*, 73 Penn. State R. 373; *Commonwealth v. Savings Bank*, 5 Allen, 247; *Allen v. Drew*, 44 Vermont, 174.

But let us suppose that the complaints made in these cases against the taxes were well founded; that the mode adopted by the board of equalization to ascertain the value of the franchise and capital stock is not the best mode; that it produces unequal and unjust results in some cases; that the same is true of the mode of ascertaining the basis of assessment for the taxation of municipalities; that the board of equalization increased the entire assessment on each company without sufficient evidence, — in short, let us suppose that in these and many other respects the proceedings were faulty and illegal. Does it follow that in every such case a court of equity will restrain the collection of the tax by injunction, or will enjoin the collection of the whole tax when it is obvious that in justice a large part of it should be paid, and if not paid, that the complainant escapes taxation altogether?

We propose to consider these questions for a moment, because the immense weight of taxation rendered necessary by the debts of the United States, of the several states, and of the counties, cities, and towns, has resulted very naturally in a resort to every possible expedient to evade its force.

It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves give the right to an injunction in a court of equity. *Moore v. Smedley*, 6 Johns. Ch. 27; *Dodd v. Hartford*, 26 Conn. 289; *Green v. Munford*, 5 Rhode Island, 478; *Messert v. Supervisors of Columbia*, 50 Barbours, 190; *Dow v. Chicago*, 11 Wall. 108; *Hannewinkle v. Georgetown*, 15 Wall. 548.

The government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid.

That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Revised Statutes, § 3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the gov-

ernment depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment, and to do this successfully other instrumentalities and other modes of procedure are necessary than those which belong to courts of justice. See *Cheatham v. Norvell*, decided at this term; *Nickoll v. United States*, 7 Wall. 122; *Dow v. Chicago*, 11 Wall. 108.

In this latter case this court, after commenting upon the necessary reliance of the state governments upon the prompt collection of the taxes for their support and maintenance, and the ill consequences of interference with their proceedings in that matter, says: "No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury; or, when the property is real estate, throw a cloud upon the title of complainant before the aid of a court of equity can be invoked." So, in the case of *Hanneuinkle v. Georgetown*, the court says: "It has been the settled law of this country for a great many years, that an injunction bill to restrain the collection of a tax on the sole ground of the illegality of the tax cannot be maintained. There must be an allegation of fraud, that it creates a cloud upon the title, that there is apprehension of a multiplicity of suits, or some cause presenting a case of equity jurisdiction." 15 Wall. 548. We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say that in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or mistakes in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax. One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is that it has no power to apportion the tax, or to make a new assessment, or to direct another to be made by the proper officers of the state. These officers and the manner in which they shall exercise their functions are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the constitutions of all the states and by the theory of our English origin, is exclusively legislative. *Heine v. The Levee Commissioners*, 19 Wall. 660.

A court of equity is, therefore, hampered in the exercise of its jurisdiction by the necessity of enjoining the tax complained of in whole or in part, without any power of doing complete justice by making, or causing to be made, a new assessment on any principle it may decide to be the right one. In this manner it may, by enjoining the levy complained of, enable the complainant to escape wholly the tax for the period of time complained of, though it be obvious that he ought to pay a tax if imposed in the proper manner.

These reasons and the weight of authority by which they are supported

must always incline the court to require a clear case for equitable relief before it will sustain an injunction against the collection of a tax, which is part of the revenue of a state. Whether the same rigid rule should be applied to taxes levied by counties, towns, and cities we need not here inquire, but there is both reason and authority for holding that the control of the courts, in the exercise of power over private property by these corporations, is more necessary, and is unaccompanied by many of the evils that belong to it when affecting the revenue of the state. High on Injunctions, § 369, and cases there cited. The assessments in the cases before us, of which complaint is made, are all made by the state board of equalization, and though the taxes are collected by the county authorities, a large part of them go to make up the revenue of the state.

In the examination which we have made of these cases, we do not find any of the matters complained of to come within the rule which we have laid down as justifying the interposition of a court of equity. There is no fraud proved, if alleged. There is no violation of the Constitution, either in the statute or in its administration by the board of equalization. No property is taxed that is not legally liable to taxation, nor is the rule of uniformity prescribed by the Constitution violated. If there is an excessive estimate of the value of the franchise or capital stock, or both, it is by an error of judgment in the officers to whose judgment the law confided that matter, and it does not lie with the court to substitute its own judgment for that of the tribunal expressly created for that purpose.

But there is another principle of equitable jurisprudence which forbids in these cases the interference of a court of chancery in favor of complainants. It is that universal rule which requires that he who seeks equity at the hands of the court must first do equity.

The defendants in all these cases are the clerks and treasurers of the counties — the clerk who makes out the tax-list, and the treasurer who collects the taxes. These taxes are both the state and county taxes. It is clear from the statements of the bills, and from what we have already said, that there must be in every county mentioned a considerable amount of real estate and personal property coming within the character of local, tangible property, and subjected to taxation on precisely the same principles, and no other, that all other personal and real estate within the county is taxed. It is equally clear that the road-bed within each county is liable to be taxed at the same rate that other property is taxed. Why have not complainants paid this tax? In reference to the latter, it is said that they resist the rule by which the value of their road-bed in each county is ascertained, and therefore resist the tax. But surely it should pay tax by some rule. If the rule adopted gives too large a valuation in some counties, it must be too small in others. What right have they to resist the tax in the latter case? And in the former, is the whole tax void because the assessment is too large? Should they pay nothing, and escape wholly, because they have been assessed too high? These questions answer themselves. Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them.

It is a profitable thing for corporations or individuals whose taxes are

very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed, of a receipt in full for all the taxes assessed.

We are satisfied that an observance of this principle would prevent the larger part of the suits for restraining collection of taxes which now come into the courts. We lay it down with unanimity as a rule to govern the courts of the United States in their action in such cases. *Cooley on Taxation*, 537; *Palmer v. Napoleon*, 16 Mich. 176; *Hersey v. Supervisors*, 16 Wisc. 185; *Roseberry v. Huff*, 27 Ind. 12; *Frazier v. Liebm*, 16 Ohio State, 614; *Parmely v. The Railroad Companies*, 3 Dillon, 19.

But if for no other reason, we should reverse the decrees of the circuit court in these cases because the same questions, involving the same considerations urged upon us here, have been decided by the supreme court of the State of Illinois in a manner which leads to the reversal of these. The cases referred to are those of *Samuel R. Porter, County Treasurer, and John W. Cook, County Clerk, v. Rockford, Rock Island & St. Louis Railroad Company*, decided at the January term, 1874, and the subsequent case of *The Chicago, Burlington & Quincy R. R. Co. v. J. J. Cole & another*, decided in June, 1875. In these two cases all the points arising in the present cases were presented to the court and decided adversely to the railroad companies. These questions all grew out of the validity and the construction of the tax law involved in the present cases, and out of the same action of the board of equalization. The validity of the statute is not seriously questioned here on the ground of any conflict with the Constitution of the United States. If any such claim be set up, it is sufficient to say it is without foundation. As the whole matter, then, concerns the validity of a state law as affected by the Constitution of the state, that question, and the other one of the true construction of that statute, belong to the class of questions in regard to which this court still holds, with some few exceptions, that the decisions of the state courts are to be accepted as the rule of decisions for the federal courts.

It is, nevertheless, a satisfaction that our judgment concurs with that of the state court, and leads us to the same conclusions.

The decrees in all these cases are reversed. The cases are remanded to the circuit court, with directions to dissolve the injunction granted in each case, and to dismiss the bills.

It was said on the argument, and seems to be conceded, that in the case of the Chicago, Burlington, and Quincy R. R. Co. an agreement existed that the mistake of the board of equalization, in assessing the company on bonds of its leased roads, might be corrected in this suit. No such agree-



ment is on file here, and we cannot act on it. But when the case is returned to the circuit, of course such decree can be rendered in that regard as counsel may agree on. A similar remark applies to what the brief of the attorney general of the state admits to be an error to the prejudice of the Chicago and Alton Company.

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## SUPREME COURT OF IOWA.

[DECEMBER TERM, 1875.]

### LIABILITY OF CORPORATION FOR WILFUL ACTS OF ITS AGENTS. — DAMAGES.

#### McKINLEY v. CHICAGO AND NORTHWESTERN RAILWAY CO.

In an action against a corporation for the wilful acts of its servant, done in the course of his employment and in the discharge of his duty, the corporation is liable for actual damages only. For all exemplary damages the servant alone is liable, unless he is authorized by the officers of the corporation to commit the wrongful act or his act is ratified or approved by them.

Actual and exemplary damages distinguished.

THIS action is brought to recover damages for an injury alleged to have been caused by a beating and forcible resistance of plaintiff by a brakeman of the defendant, when plaintiff was about to enter a passenger car of the defendant's at Howard Junction, Wisconsin, on March 22, 1872. Upon a general issue as to the facts alleged by plaintiff, and the liability of defendant, the cause was tried to a jury, who found a verdict for plaintiff in the sum of twelve thousand dollars. A judgment was rendered thereon, from which the defendant appeals.

*E. S. Bailey & N. M. Hubbard*, for appellant.

*Shiras, Van Duzee & Henderson and Thompson & Davis*, for appellee.

COLE, J. I. At the appearance term, November, 1872, the defendant moved to suppress the depositions of certain witnesses, because the certificate of the officer taking them did not show that the same were read over to the witnesses by him before the same were signed and sworn to; and because it did not state whether either party, his attorney, or agent, was present at the taking. This motion was not called up for determination until the following March term of the court. In the mean time, and on January 20, 1873, the officer taking the depositions sent to the clerk of the court a further and additional certificate made as required by law, and showing that said depositions were properly taken. The court overruled the motion, and hereon arises the first question in order. We see no reason why the officer taking a deposition may not amend his certificate according to the facts; and when, as in this case, there is no showing or complaint but that the amended certificate truly states the facts connected with the taking of such depositions, the court may accept the same

as true. This being so, it follows that there was no error in overruling the motion.

II. The next question arises upon the giving and refusing to give instructions. The evidence is too voluminous to give, even in a summary; and it will be sufficient to state that there was testimony to justify the giving of the instructions asked, if they correctly stated the law. The leading facts are that the plaintiff is a citizen of Iowa, and in March, 1872, purchased of defendant a ticket in Chicago, from there to Beloit; that a change of cars became necessary at Howard Junction; the plaintiff undertook to enter the rear car of the defendant's train upon which he was to continue his journey, and a brakeman of the defendant was at the door, charged with that duty, and refused admission to plaintiff on the ground that the rear car was for ladies, and for gentlemen accompanied with ladies, and directed him to the next car forward. The plaintiff insisted upon entering the rear car, and a rencounter there occurred between the plaintiff and the brakeman. The testimony respecting the contest between them and the extent of the injury the plaintiff received is very conflicting, and wholly irreconcilable.

The defendant asked, among others, the first instruction following, which was refused; and the court gave, on its own motion, the next instruction following, to each of which the defendant duly excepted, and now assigns such refusal and giving as error.

"1. A railroad company is not responsible for the criminal or wilful acts of its agents or servants. It is only answerable for their negligent and careless acts done or omitted in the course of the performance of their duties. Therefore if you find from the testimony in this case that the brakeman assaulted plaintiff and inflicted the injuries complained of, such acts are criminal and wilful, and plaintiff cannot recover in this action, unless it is shown that defendant authorized the act or approved it afterward. There is no proof of any authority from defendant to assault or injure plaintiff, and no ratification of the brakeman's act."

"4. Much has been said in the argument to the court as to the liability of the company for the alleged wrongful and criminal assault and battery by the brakeman. You are instructed that if the plaintiff attempted to reënter the car, and was without fault on his part, as hereinafter explained, and the brakeman with the intent and purpose to prevent him from reëntering the car, for the reason that it was not intended for gentlemen unaccompanied by ladies, violently assaulted and injured the plaintiff and was guilty of a criminal act in so doing, the defendant is liable for such injury; and the fact, if so it is, that the brakeman used such force and violence as to render himself criminally liable, does not exonerate the defendant. In other words, if the brakeman, in executing what he supposed to be his orders, used force and violence when his orders did not contemplate such means, the company is liable for such injuries as his violence occasions."

The district court, by refusing the first of the above instructions, denied that a railroad company could not be liable for the acts of an employee when done wilfully so as to constitute a crime; and by giving the last, affirmed that it would be liable for even the wilful criminal acts of its employees when done in the course of their employment. It was held

by this court in *De Camp v. The M. & M. R. Co.* 12 Iowa, 348, and also in *Cook v. The Ill. Cent. R. Co.* 30 Iowa, 202, each of which cases was brought to recover damages for running over stock on the track of the defendant's railroad, that "a railroad company is not responsible for the criminal or wilful acts of its agents or servants." The first case does not state the facts upon which the doctrine was announced; while in the second, it was expressly found by the jury that the act of the engineer in charge of the engine which struck the colt was intentional and wilful. Neither case shows that the act done, which produced the injury, was done in the course of the employment of the servant doing the wilful act. In the absence of such showing, and where the wilfulness of the act affirmatively appears, there can be no reasonable doubt of the correctness of the doctrine. It may also be noticed, that in each of these cases the injury was done to stock, respecting which neither the railroad company or its employees were under any obligations of positive or affirmative duty. These cases, therefore, do not settle the doctrine for, nor apply to, the case now before us.

If we were left to determine the question, upon principle, whether an employer should be held liable for the wilful or criminal acts of the employee done in the course of his employment, we should have very little or no hesitation in affirming such liability. And this, because the employer has placed the employee in a position to do the wrong, and it being done in the course of his employment, the intent with which it was done should not affect the liability of the employer. Whether the intent of the employee is good or ill, so long as he acts within the scope of his employment, the employer should be bound. But his liability is limited to the actual damages. So far as the element of malice or of crime enters into the act or affects the measure of damages, the employee alone is liable.

The decided weight and number of the authorities are in accord with this view. We need only refer to some of them, without stopping to discuss or review them. See *Turner v. The North Branch R. R. Co.* 84 Cal. 594; *Great Western R. R. Co. v. Miller*, 19 Mich. 305; *Finney v. C. R. & R. Co.* 10 Wisc. 395; *Brooks v. Penn. R. R. Co.* 57 Penn. St. 339; *St. Louis & Alton R. R. Co. v. Dalby*, 19 Ill. 353; *Little Miami R. R. Co. v. Wetmore*, 19 Ohio, 110; *Isaacs v. Third Avenue R. R. Co.* 47 N. Y. 122; *Chicago & Alton R. R. v. Ames*, 40 Ill. 543.

III. There were other instructions asked and refused, and errors are assigned thereon; but in our view the instructions given fairly covered the grounds of those refused; and we do not deem it necessary to set them out in full, or to review the criticism of counsel upon them.

IV. Upon the question of damages the court gave the following instruction:—

"9. If, in the light of the foregoing instructions, you find from the evidence that the plaintiff is entitled to recover, the next question is as to the measure of damages to which the plaintiff is entitled. There being no evidence in the case that the general officers of the defendant advised the wrongful act, or ratified it after it was done, this is not a case where exemplary or positive damages can be allowed. The principal cannot be punished by awarding exemplary damages against him for the wilful, wrongful, or malicious act of his agent or servant, unless the wrongful

act was done by the direction of the principal or was afterwards ratified by him. The extent of the damages in such cases is what the law calls compensatory. Compensatory damages embrace the reasonable expenses incurred by the plaintiff, if any, in curing or endeavoring to cure the injuries he received; also the damages suffered, if any, from the loss of time and inability to attend to business, resulting from the injuries received; also the bodily pain and suffering, if any, resulting from the injuries received, *and for the outrage and indignity put upon him*; and if you find from the evidence that the plaintiff has not yet recovered from the injuries received, or if you find that the injuries are permanent, you should add such damages as you believe, from the testimony, it is fair to infer the plaintiff will suffer in the future. Taking *all* these elements into consideration, you will ascertain the amount of damages suffered by the plaintiff. He should be *fully compensated*. There has been much testimony as to the character and extent of the plaintiff's injuries, and surgical experts have been examined on this question; this evidence is entitled to your consideration, and it is for you to determine therefrom, as well as from the other evidence in the case, how great the injuries were and whether they are permanent or not."

The general rule as to the measure of damages laid down by this instruction is undoubtedly correct; that is, the damages are to be compensatory, and not exemplary or punitive. But the instruction, in specifying the items of compensatory damages, expressly mentions one which is purely and highly exemplary, or imaginary and speculative, to wit, the outrage and indignity put upon plaintiff; and as if to fasten it upon the jury, the instruction tells them that they must take *all* these elements into consideration, and that the plaintiff must be *fully compensated* for them all. The phrase "for the outrage and indignity put upon him," is but an intenser form of expression conveying the idea of damages for the "wounded feelings," or for injury to feelings. And damages for such outrage or wounded feelings are essentially exemplary, or imaginary and speculative, and not *actual*. If they are not, then it seems to us there can be no such thing as *speculative* damages. Such wounded feelings are allowed to be considered in assessing damages for an assault and battery between the parties; for in such cases malice enters into the question. But in this case the defendant is not liable for the malice; or, as the general rule contained in the instruction correctly states, "the defendant is not liable for the malice, but only for the actual damages." For a discussion of the question and elements for exemplary damages, see *Hendrickson v. Kingsbury*, 21 Iowa, 379; and for a discussion and review of cases showing that pain of mind or indignity cannot be other than exemplary damages, see *Johnson v. Wells, Fargo & Co.* 6 Nevada, 224. Since the judgment must be reversed for this error in the instruction respecting the measure of damages, it becomes unnecessary to decide whether the evidence is sufficient to sustain the verdict, or whether the damages are excessive.

After the foregoing opinion had been prepared, and been the subject of discussion at several successive consultations by all the members of the court, without being able fully to agree, a reargument of this case was

ordered upon two questions: *First*, whether exemplary damages are recoverable against a corporation in actions of this character; and *second*, whether "the outrage and indignity put upon" one in such case should be classed with actual or exemplary damages? The reargument has been made. We do not stop to elaborate our views upon these questions, but content ourselves with the statement of a brief summary of our conclusions thereon.

It appears to us that, in an action against a corporation for the wilful acts of its servant done in the course of his employment and in the discharge of his duty, the corporation is liable for only the actual damages to the injured party; that for all exemplary damages growing out of such wilful assault, the servant alone is liable; that if the corporation, through its principal officers, shall authorize the servant to commit the wrongful acts in his own wilfulness, or shall approve or ratify his wilful acts after they are done, then such corporation is liable for all the damages, both actual and exemplary, which the party injured may have suffered; that pain of body may, upon the authorities, be classed among actual damages; but pain of mind or mental suffering can, if at all, be classed as actual damages only when such mental pain or suffering grows out of or is inseparably connected with the actual injury received; that "outrage or indignity put upon" one arise necessarily from the wilfulness, wantonness, gross negligence, or oppressive manner in which the injury is inflicted, and belongs to that class of damages for which the servant alone is liable.

*Reversed.*

BECK, J., dissenting.

## COURT OF APPEALS OF MARYLAND.

(To appear in 42 Md.)

ATTACHMENT. — BANKRUPTCY. — CONSTRUCTION OF SECTIONS 14, 35, AND 39 OF THE BANKRUPT ACT OF 1867.

HENKELMAN v. SMITH, assignee.

The failure of the defendant to appear and defend an attachment against his property is no evidence of his having done any act to *procure* the attachment within the meaning of section 35 of the Bankrupt Act of 1867, or to *procure* or *suffer* his property to be taken under legal process within the meaning of section 39 of said act.

Section 14 of the bankrupt act refers and can only refer to attachments which are *pending* at the time the petition in bankruptcy is filed, and not to such as have been prosecuted to a judgment prior to the filing of such petition.

The attachment having been properly issued and prosecuted to judgment, that judgment is final, imports absolute verity, is conclusive with respect to the subject matter adjudicated, and cannot be reexamined or impeached in a collateral proceeding.

APPEAL from the court of common pleas.

The facts of this case are sufficiently stated in the opinion of the court.

At the trial the plaintiff offered the three following prayers: —

1. If the jury shall find from the evidence in this case that Frederick Witte was insolvent on the 14th day of April, 1873, and that on said day the defendants in this case issued out an attachment on mesne process, against the goods, chattels, and effects and property, real and personal, of the said F. Witte, upon which the property of said Witte was attached, and under order of court was subsequently sold for \$591.40, of which sum \$478.22 was subsequently paid to said plaintiffs (now defendants); and shall further find, that when said attachment was brought and said money was received, the said plaintiffs (now defendants) had reasonable cause to believe that a fraud on the act of Congress, entitled: "An act to establish a uniform System of Bankruptcy throughout the United States," approved March 2, 1867, was intended; and the jury shall further find, that within four months from the institution of said attachment proceedings in bankruptcy had been commenced against said F. Witte, upon which he was subsequently adjudicated a bankrupt, and that the plaintiff had been chosen assignee of said bankrupt, then the jury shall render their verdict for the plaintiff in this action, for the amount of sales of said goods so seized under said attachment, with interest at the rate of six per cent. per annum, from the 26th day of May, 1873.

2. If the jury shall find from the evidence that Frederick Witte, on the 14th day of April, 1873, being insolvent, suffered his property to be taken on legal process, by virtue of an attachment on mesne process issued out of the court of common pleas of Baltimore city, by the defendants in the case now at issue, with the intent by such disposition of his property to defeat or delay the operation of the act of Congress, entitled "An act to establish a uniform System of Bankruptcy throughout the United States," approved March 2, 1867; and shall further find that said Frederick Witte afterwards, to wit, on the 5th day of June, 1873, was adjudicated a bankrupt, upon petition of his creditors, filed the 26th of May, 1873, and that the plaintiff in this case was duly appointed assignee of said bankrupt's estate, and that the defendants in this case, when receiving the payment of the proceeds of said attachment, had reasonable cause to believe that a fraud on said act of Congress was intended, and that said F. Witte was insolvent, then the plaintiff in this case is entitled to recover the sum of \$591.40, the gross amount of sales of goods received under said attachment, with interest thereon from the 26th of May, 1873.

3. That if the jury find the facts set forth in the foregoing prayer, they shall treat the fact that the said F. Witte was insolvent at the time of the payment of the proceeds of said attachment, and that proceedings in involuntary bankruptcy had been commenced against him, as evidence of fraud.

And the defendants offered the following prayers:—

1. There is no evidence in this cause legally sufficient to enable the plaintiff to recover under any of the counts in the declaration.

2. That under the pleadings and evidence in this cause the plaintiff is not entitled to recover.

The court (Garey, J.) granted the plaintiff's prayers, and rejected those of the defendants.

And the defendants, at the argument thereof, in addition to their other

objections to the plaintiff's prayers, objected to the plaintiff's first prayer, because there was no evidence in the cause in fact, and because there was no evidence sufficient in law that Frederick Witte was insolvent on the 14th of April, 1873, or that when the attachment was brought, and said money was received, the defendants had reasonable cause to believe that a fraud on the act of Congress, entitled "An act to establish a uniform System of Bankruptcy throughout the United States," approved March 2, 1867, was intended.

And to the second prayer they objected, in addition to other objections, because there was no evidence in fact, and there was no evidence sufficient in law, that on the 14th of April, 1873, Frederick Witte being insolvent, suffered his property to be taken on legal process by virtue of an attachment on meane process, issued out of the court of common pleas of Baltimore city, by the defendants, in the case now at issue, with the intent, by such disposition of his property, to defeat or delay the operation of the act of Congress aforesaid, or that the defendants, when receiving the payment of the proceeds of said attachment, had reasonable cause to believe that a fraud on said act of Congress was intended, or that F. Witte was insolvent. And to the third prayer they objected, in addition to the other objections, that there was no evidence in fact, and that there was no evidence sufficient in law, that said Witte was insolvent.

But the court was of opinion, and so ruled, that there was such evidence, and overruled all the aforesaid objections of the defendants to the prayers of the plaintiff for want of evidence as aforesaid.

To the granting of the prayers of the plaintiff and the rejection of the defendants' prayers, and to the rulings of the court upon the objections to the prayers of the plaintiff for want of evidence to sustain them, the defendants excepted, and the verdict being against them they took this appeal.

The cause was argued before Bartol, C. J., Stewart, Brent, Grason, Miller, Alvey, and Robinson, JJ.

*M. R. Walter*, for the appellants. The court, in the consideration of this case, is compelled to confine itself to the agreed statement upon which it was submitted, and is not authorized to draw any inferences of fact therefrom, no such power having been given by the consent of the parties. *Wright v. Wright's Lessee*, 2 Md. 450; *Vansant v. Roberts*, 3 Md. 127; *McTavish v. Carroll*, 7 Md. 361; *McColgan v. Hopkins*, 17 Md. 402; *Dennis & Rush v. Dennis's Ex'r*, 15 Md. 73.

The attachment proceedings cannot be collaterally impeached. *Gordon's Ex'r v. Mayor, &c. of Balto.* 5 Gill, 242.

From the case stated, it appears no steps were taken in the attachment cause to have it dissolved; on the contrary, a judgment of condemnation was regularly rendered on the 13th day of May, 1873, before the commencement of bankruptcy proceedings, into which the attachment merged and which still stands, and under which the money deposited in court, amounting to \$478.22, was ordered to be and was paid to the appellants on account of their claim of \$517.34.

All proceedings under an attachment, up to the time it is dissolved, are valid, if the attachment has, as in this case, been properly issued. *In re Housberger & Zibelin*, 2 B. R. 33; *In re C. H. Preston*, 6 B. R. 545.

A judgment of condemnation in attachment is a final judgment, and imports absolute verity, and the rights of the appellants under the attachment are therefore *res adjudicata*. *Gordon's Ex'r v. Mayor, &c. of Baltimore*, 5 Gill, 242; *Walters & Harvey v. Munroe*, 17 Md. 501.

The proceedings in bankruptcy after the judgment in this attachment can therefore have no effect on the judgment or upon the property attached. *Hilliard on Bankruptcy*, 127; *Appleton v. Bowles*, 2 N. Y. (S. C.) 570; *Ames v. Wentworth*, 5 Metc. 297.

The 14th section conveys to the assignee *only* "the estate, real and personal, of the bankrupt," &c., which the bankrupt had at "*the commencement of said proceedings in bankruptcy*," although *the same* be then attached on mesne process, and dissolves any *such* attachment made within four months preceding the commencement of said proceedings.

It is clear from this that only the property held by the bankrupt *when bankruptcy proceedings were commenced* will vest in the assignee, and the language, "although the *same* is then attached on mesne process," "and shall dissolve any such attachment made within four months," &c., must be construed with that which precedes it, and can only mean that it will release all property belonging to the bankrupt *on the day of petition filed* from the lien of any attachment issued within four months prior thereto, and which may *then* be pending.

In this case the whole fund (the net proceeds of the goods attached) became *the property of the appellants* by the judgment of condemnation in their favor, and could therefore not be affected by the subsequent institution of proceedings in bankruptcy. It is as much the policy of the bankrupt law to uphold liens when valid as it is to set them aside when invalid. *In re Wynne*, 4 B. R. 23; *Potter v. Coggeshall*, 4 B. R. 73.

The agreed statement of facts will not justify a recovery under the 35th section.

To make an attachment void thereunder, the following facts must concur: —

1st. The debtor must be insolvent. 2d. The debtor must procure or suffer his property to be attached with a view to give a preference to the attaching creditor. 3d. The attaching creditor must have reasonable cause to believe the debtor insolvent, *when the attachment issued*. 4th. The attachment must be in fraud of the provisions of the bankrupt law. 5th. And must have taken place within four months before the filing of the petition against the bankrupt.

The case stated here contains no admission in any manner or form that the debtor was insolvent when the attachment issued, nor that the appellants had reasonable cause to believe him insolvent at that time. Insolvency cannot be inferred from his having absconded, even had the court a right to draw such inference. He may have been amply able to meet his obligations as they matured, and yet attempted to defraud his creditors. Because his conduct may have been an act of bankruptcy, it is not proof of insolvency. Neither does the fact that he was adjudicated a bankrupt determine the question of insolvency *in this cause*, even had the petition been filed on the day the attachment issued. See *In re Drummond*, 1 B. R. 231; *Lewis v. Sloan*, 68 N. C. 562.

There is furthermore no evidence that the debtor procured or suffered



his property to be attached with a view to give a preference to the appellants. Indeed there is not only an entire absence of proof that the debtor did anything in aid of it, but there is even no evidence that he had any knowledge of the pendency of the proceedings. See *Wilson v. City Bank*, 17 Wallace, 473.

There is furthermore nothing in the case stated to indicate that the attachment was in fraud of the bankrupt law.

The appellee is not entitled to a judgment under the 39th section, for he must show : —

1st. That the debtor was insolvent or in contemplation of insolvency.  
2d. That the debtor procured his property to be taken on legal process.  
3d. That the debtor did so with intent on his own part to give a preference to the creditor, or with intent on his own part to defeat or delay the operation of the act. 4th. The creditor must have had reasonable cause to believe the debtor insolvent, and must have known that a fraud on the act was intended.

There is an entire absence of proof on these points, of which affirmative testimony is required.

But even were the appellee entitled to recover, the judgment could not be for more than the amount paid into court, \$478.22, the only moneys that came into the hands of the appellants.

*Henry D. Loney*, for the appellee. The assignment made on the 21st of July, 1873, to the appellee as assignee in bankruptcy of F. Witte, related back to the 26th day of May, 1873. Bankrupt Act, sec. 14; Rev. Stat. U. S. sec. 5044.

By virtue of said assignment "by operation of law," the title to all the estate of the bankrupt, both real and personal, vested in the appellee, although the same was then attached "on mesne process" as the property of the debtor, F. Witte, and dissolved such attachment, it having been made within four months next preceding the 26th day of May, 1873. Rev. Stat. U. S. 5044; Bankrupt Act, sec. 14.

The attachment in this case, being an attachment on warrant against an absconding debtor, was an attachment on "mesne process." *Corner v. Mallory*, 31 Md. 468.

The property so seized on attachment being a part of the estate of the bankrupt, the appellee, as assignee thereof, was entitled to sue for and recover the same. Bankrupt Act, sec. 14; Rev. Stat. secs. 5046 and 5047.

The appellee was entitled to recover independently of the 14th section and by virtue of the 39th section of the bankrupt act, as F. Witte, the bankrupt, when insolvent (his absconding was evidence of insolvency), suffered (because he was at home liable to process on the 26th of May, and by an appearance could then have prevented the condemnation *nisi*) his property to be taken on legal process, with the intent (*In re Drummond*, 1 Bankrupt Register, 10) to defeat or delay the operation of the bankrupt act, and having been adjudged a bankrupt, the appellee (his assignee) could recover back the money transferred contrary to the act of Congress,—the appellants having reasonable cause to believe that a fraud on the act was intended, and (knowing) that the debtor was insolvent. Bankrupt Act, sec. 39.

The appellee was entitled to recover from the appellants not only the

amount actually paid to them, but also the amount paid for costs of sheriff and expenses of sale. *Street v. Dawson*, 4 B. R. 60; *In re G. S. Ward*, 9 B. R. 849; *Zeiber v. Hill*, 8 B. R. 289; *In re Preston*, 6 B. R. 595.

GRASON, J., delivered the opinion of the court.

It appears from the record in this case that the appellants, on the 14th day of April, 1873, caused an attachment on warrant to be issued against the goods and chattels of Frederick Witte, returnable to the May term of the court of common pleas of Baltimore city, to be held on the 9th day of May, and that on the 24th day of April, an order was passed by said court for the sale of the goods, and that from said sale the sum of five hundred and ninety-one dollars and forty cents was realized, and that said proceeds of sale, less the cost and expenses of sale, were paid into court. On the 13th May, judgment of condemnation was duly entered, and said proceeds were paid to the appellants on the 5th day of June following, under an order of court passed on the 4th day of the same month. It further appears that on the 26th day of May, 1873, a petition in bankruptcy was filed against Frederick Witte, by some of his creditors, and that on the 5th June he was adjudicated a bankrupt, and that on the 21st day of July the appellee was elected assignee of the estate of the bankrupt. On the 6th day of December, 1873, the appellee instituted this suit in the court of common pleas to recover from the appellants the whole proceeds of the sale, which had been paid to them under the order of that court. The case was tried before the court on an agreed statement of facts, and at the trial three prayers were offered by the appellee and two by the appellants, the former of which were granted and the latter refused. The appellants excepted to the granting of the appellee's prayers and to the rejection of their own, and the judgment being against them they have taken this appeal.

It was contended by the appellee's counsel that the appellee, under the agreed statement of facts, had a right to recover under either the 14th, 35th, or 39th sections of the bankrupt act, and that his three prayers were properly granted. The 35th section provides that if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor, or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized under execution, &c., the person to be benefited by such attachment having reasonable cause to believe such person insolvent, and that such attachment is in fraud of the provisions of the act, the same shall be void and the assignee may recover the property or its value.

The 39th section declares what shall be an act of bankruptcy, and provides, among others, that if a person, being insolvent, or in contemplation of bankruptcy or insolvency, shall give a warrant to confess a judgment, or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or with intent, by such disposition of his property, to defeat or delay the operation of the bankrupt act, he shall be deemed to have committed an act of bankruptcy, and the assignee may recover the money or property if the person shall be adjudged a bankrupt, provided the person taking the property had reason-

able cause to believe that a fraud on the act was intended, or that the debtor was insolvent. It will be observed that by the 35th section, in order to render the attachment void and enable the assignee to recover, the debtor must be insolvent, or, contemplating bankruptcy, must *procure* his property to be attached, within four months before the petition in bankruptcy is filed, *with a view to give a preference*, and the plaintiff in the attachment must have reasonable cause to believe the debtor insolvent, and that the attachment is in fraud of the provisions of the bankrupt act. And under the 39th section, to render the legal process void and to enable the assignee to recover, the debtor must be bankrupt or insolvent, or contemplating bankruptcy, and must *procure or suffer* his property to be taken on legal process with intent to give a preference, or to defeat or delay the operation of the act. And if the party be adjudged a bankrupt, the assignee may recover, provided the party taking the property had reasonable cause to believe that a fraud on the act was intended, or that the debtor was insolvent. It does not appear from the statement of facts in this case that Frederick Witte, the debtor, has done any act to *procure* the attachment, or to *procure or suffer* his property to be taken on legal process, with intent to give the appellants a preference over his other creditors, or with intent to defeat or delay the operations of the bankrupt act. So far as the statement of facts discloses, he has done absolutely nothing. But it was contended that, as the defendant did not appear to the attachment suit, when it was in his power to do so and prevent the judgment of condemnation, he is to be considered as having suffered his property to be condemned with intent to give a preference to the appellants. In this view we cannot concur. The bankrupt act clearly contemplates *some act to be done* by the debtor to *procure* or to *suffer* his property to be taken under attachment or legal process, and this view is sanctioned by the highest authority, that of the supreme court, in the case of *Wilson v. City Bank*, 17 Wallace, 487, 488. The City Bank obtained a judgment against Vanderhoof Brothers *by default*, and the same day issued execution, which was levied on their whole stock in trade, which was sold. After the levy of the execution and before sale, Vanderhoof Brothers were adjudged bankrupts on the petition of other creditors.

Vanderhoof Brothers were insolvent at the time they were sued by the bank, and the latter had reasonable cause to believe that they were, and that they had committed an act of bankruptcy, and that they had no property other than their stock in trade. The money arising from the sale under the execution was in the bankrupt court awaiting the termination of the suit between the assignee and the bank. These facts were found by the court, and are much stronger in favor of the assignee's right, than are those contained in the agreed statement in this case. In that case, as in this, it was contended that the failure of the debtor to appear and defend the suit furnished evidence of his *procuring* or *suffering* his property to be taken on legal process with intent to give the creditor a preference, or to defeat or delay the operation of the law. Mr. Justice Miller, in delivering the opinion of the court, says, in referring to the words "procure" and "procure and suffer," as used in the 35th and 39th sections respectively: "In both there must be the positive purpose of doing an act forbidden by the statute, and the thing described must be

done in the promotion of this unlawful purpose. The facts of the case before us do not show any positive or affirmative act of the debtors, from which such intent may be inferred. Through the whole of the legal proceedings against them, they remained perfectly passive. They owed a debt which they were unable to pay when it became due. The creditor sued them, and recovered judgment and levied execution on their property. They afforded him no facilities to do this, and they interposed no hindrance. It is not pretended that any positive evidence exists of a wish or design on their part to give this creditor a preference, or oppose or delay the operation of the bankrupt act. There is nothing morally wrong in their course in this matter. They were sued for a just debt. They had no defence to it, and they made none. To have made an effort by dilatory or false pleas to delay a judgment in the state court, would have been a moral wrong and a fraud upon the due administration of the law."

In that case the supreme court decided : —

1. That something more than passive non-resistance of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained, when the debt is due and he is without just defence to the action, is necessary to show a preference to a creditor, or a purpose to defeat or delay the operation of the bankrupt act.

2. That the fact that the debtor, under such circumstances, does not file a petition in bankruptcy, is not sufficient evidence of such preference, or of intent to defeat the operation of the act.

3. That, though the judgment creditor in such case may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the bankrupt act.

4. That a lien, thus obtained by him, will not be displaced by subsequent proceedings in bankruptcy against the debtor, though within four months of the filing of the petition. In the case now under consideration there is no more evidence to show that Frederick Witte *procured* this property to be taken under the attachment, or *procured* or *suffered* it to be taken on legal process with intent to give a preference to the appellants, or to defeat or delay the operation of the bankrupt act, than there was in the case of *Wilson v. City Bank*, above referred to, and we think it clear that the appellee has no right to recover from the appellants under either section 35 or 39.

But it was contended that the appellee had a right of recovery under section 14. That section provides that as soon as an assignee is appointed and qualified, the judge or register shall assign and convey to the assignee all the estate of the bankrupt, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and thereupon, by operation of law, the title to such property shall vest in the assignee, although the same is then attached on *mesne* process, as the property of the debtor, and shall dissolve such attachment if made within four months next preceding the commencement of said proceedings. We are of opinion that the appellee has no better foundation for his claim to recover under this section than under the 35th and 39th. This section refers, and can only refer to attachments, which are *pending* at the time the petition in bankruptcy is filed. The petition against Witte was filed on the 26th May, 1873 ; he was adjudged a bankrupt on the 4th June ; and the assignee

was elected on the 21st July following. The assignment to him then related back to the 26th May, and vested in him the title to all the property which belonged to the bankrupt at that date. But the property, which is the subject of this suit, had been attached on the 14th day of April, was sold under the order of the court on the 24th day of the same month, and the attachment was prosecuted to judgment on the 18th day of May, thirteen days before the petition in bankruptcy was filed, and by that judgment the proceeds of the sale of the property had been vested in the appellants. The attachment having been properly issued and prosecuted to judgment, that judgment is final, imports absolute verity, is conclusive with respect to the subject matter adjudicated, and cannot be reëxamined or impeached in a collateral proceeding. *Gordon's Ex'r v. Mayor & City Council of Baltimore*, 5 Gill, 242; *Walters & Harvey v. Monroe*, 17 Md. 506. The judgment in this case cannot, therefore, be affected by the proceedings in bankruptcy. *Appleton v. Bowles*, 2 N. Y. (S. C.) Rep. 596.

As we have shown that the appellee has no right to recover in this case under either of the sections of the bankrupt act before referred to, for the reasons stated, it is unnecessary to notice in this opinion the further question, which was argued in this court, whether it is the duty of the assignee in bankruptcy to make known by proper proceedings to the state court the fact that the defendant in an attachment has been adjudged a bankrupt. As there was error in granting the appellee's prayers and in refusing to grant those of the appellants, the judgment appealed from will be reversed, and as the plaintiff can in no event recover in this case, a new trial will not be awarded.

*Judgment reversed.*

## SUPERIOR COURT OF NEW HAMPSHIRE.

(To appear in 54 N. H.)

REMOVAL OF CAUSES. — WHEN PETITION WILL BE ENTERTAINED.

CHANDLER v. COE.

In accordance with the provisions of the Revised Statutes of the United States, enacted June 22, 1874, and the subsequent Act of Congress of March 3, 1875, a cause will not be removed from a state court to the circuit court of the United States, unless the petition for such removal be filed in the state court before or at the term at which said cause could first be tried, and before the first trial thereof.

Such petition will not, therefore, be entertained, when filed in the state court after a verdict in the cause has been rendered, notwithstanding the verdict may have been set aside for error and a new trial ordered.

FROM Coos circuit court. The plaintiff is a citizen of New Hampshire. The defendants were citizens of Maine. The defendant, S. R. Bearce, is now dead, and his death has been suggested on the record. The cause was tried by jury at the November term, 1873, of the supreme

judicial court for this county, resulting in a verdict for the plaintiff. That verdict was set aside by the whole court at the June term, 1874, and a new trial granted. At the November term of the circuit court, 1874, upon petition of the defendant, an order was entered on the docket for the removal of the cause to the federal court, an affidavit and bond being filed in accordance with the Act of Congress of 1867. At the present term the cause stood upon the printed docket, and, although copies in due form had been made out by the clerk at the request of the defendants to be entered in the United States circuit court, the cause had not been actually entered there, the copies had not been taken from the manual custody of the clerk, and no term of said United States circuit court had intervened.

The plaintiff moved that the order of removal, made at the last November term, be rescinded. This motion was granted by the court, and the defendants excepted. All questions of law and discretion arising upon the foregoing statement were transferred by Ladd, J.

*Ray & Drew and Geo. A. Bingham*, for the plaintiff.

*Fletcher & Heywood and Burns & Heywood*, for the defendants.

FOSTER, C. J., C. C.<sup>1</sup> The defendant filed his petition for the removal of this cause into the United States court at the November term of our circuit court, 1874. His rights in respect of the removal of the cause, therefore, depend upon the provisions of the Revised Statutes of the United States, enacted June 22, 1874, and the subsequent Act of Congress of March 3, 1875, and not upon the provisions of the acts of 1866 or 1867, which were repealed by the enactment of the Revised Statutes. The propriety of the rescission by the judge presiding at the April term, 1875, depends upon the settlement of the question whether the defendant was entitled, under the federal statutes, to have the cause removed, after one trial upon its merits, before a second trial, which had been ordered by the full bench for error in the previous trial.

By the terms of the U. S. Rev. Stats. ch. 7, sec. 639, par. III. the petition for removal must be filed "before the trial or final hearing of the suit."

In *Whittier v. The Hartford Fire Ins. Co.* 55 N. H. 141, at the last March session of this court, my brother Smith, the other judges concurring, expressed his interpretation of the language used in the statute as meaning, not before the final trial or final hearing, but before any trial or any final hearing of the suit.

In *Insurance Co. v. Dunn*, 19 Wall. 214, in construing the Act of Congress of 1866, in which the words used were the same as those adopted in the revision of 1874 — "at any time before the trial or final hearing" — Swayne, J., said: "The language above quoted — 'at any time before the final hearing or trial of the suit' — of the Act of March 2, 1867, is not of the same import as the language of the Act of July 27, 1866, on the same general subject — 'at any time before the trial or final hearing';" and his deduction is, that under the Act of 1867 a removal might properly be made, after a trial on the merits and a judgment on the verdict, in a state where by local statute the party could still demand, as of right, a second trial, but that doubts, at least, might be entertained as to whether such would be the proper construction of the Act of 1866; and if, as he sug-

<sup>1</sup> Ladd, J., having presided at the trial, did not sit.

gests, the change was deliberately made in 1867 to obviate those doubts and to make the latter act more comprehensive, so it is equally fair to presume that the change in 1874 to the language used in the Act of 1866 was deliberately made, not to revive "doubts that might possibly have arisen" under the Act of 1866, but to make the latter act (of 1874) more restrictive.

Happily, no doubts can remain concerning the present intention of Congress to limit the removal of causes from the state to the federal courts to a period antecedent to the first trial of the suit; for the Act of March 3, 1875, sec. 3, provides that the petition for removal shall be filed in the state court "before or at the term at which said cause could be first tried, and before the trial thereof."

This act was passed some weeks before the judge made the order of re-scission in the present case, and this declaration of the law and policy of the federal Congress manifests the prudence of the judge's order, so far as the matter rested in his discretion.

In *Whittier v. Insurance Co.* the petition for removal was made after a trial and judgment, unreversed by the proceedings in review; but the distinction between that case and the present is one without substantial difference, as it seems to me; for in this case as in that the defendant, the verdict against him having been set aside, was as much entitled to demand a new trial as in the former case the party was entitled to demand it under the statute granting a right of review. In both cases there was one trial of the cause upon its merits before application for removal, and in neither case was that one trial a final trial. In *Whittier v. Insurance Co.* the petition for removal was denied.

In *Galpin v. Critchlow*, 13 Am. Law Reg. (N. S.) 137 (probably to be published in 114 Mass.), it was decided that an action cannot be removed from a state court into the circuit court of the United States under the Act of Congress of 1867, after a trial on the merits, although such trial has resulted in a disagreement of the jury.

*A fortiori*, if the reasoning of Judge Swayne and my brother Smith is correct, such cause could not in the same circumstances be removed under the Act of 1866.

It will be borne in mind that the terms used in the Act of 1866 are "before the trial or final hearing;" those employed in the Act of 1867 are "before the final hearing or trial."

In *Galpin v. Critchlow*, Mr. Chief Justice Gray does not contend that these terms are not equivalent. They are, in fact, whatever may have been the intention of the legislators, mere transpositions in the two several acts. And, regarding the words under consideration as practically synonymous, the learned chief justice infers that the Act of 1866 (and 1867, likewise) "has regard to suits in equity as well as at law;" because it enlarges the right of removal under the Act of 1789 (which was "at any time before trial"), by conferring the right in suits brought "for the purpose of restraining or enjoining" the defendant. In the Act of 1866, ch. 288, we find for the first time, if I am not mistaken, the words "or final hearing of the cause" added to the words "at any time before the trial."

"Trial," says Mr. Chief Justice Gray, "appropriately designates a trial by the jury of an issue which will determine the facts in an action at law;

and 'final hearing,' in contradistinction to hearings upon interlocutory matters, the hearing of the cause upon its merits by a judge sitting in equity. The whole effect of the change in the statute in this respect seems to us to have been to allow the defendant the same time to elect whether he will remove the case into the federal court, as he has to prepare for a trial at law, or hearing upon the merits in equity in the state court; . . . but not to allow him, after the experiment of entering upon one such trial or hearing in the court in which the suit is commenced, to transfer the case to another jurisdiction."

The learned chief justice "cannot believe that Congress, by transposing" the words, "intended that a right of removal depending upon a mere affidavit of the party to a condition of things which litigants are too often prone to suspect, and conferred by this statute upon a plaintiff who has voluntarily resorted to the state court, as well as a defendant who has been compelled to appear therein to protect his rights, should be exercised after once submitting the case to be decided in the state court upon its merits, and at a later stage than any other suit is authorized to be removed from the state to the federal courts, except by writ of error after judgment."

Judge Redfield, in a note appended to this case as reported in the Law Register, commends the opinion not only for the "ingenious and happy argument" presented therein, but for its "fairness and dignity," calculated, as the conclusion of the court is, "to maintain proper respect for the spirit of the national legislation in general, especially towards the state courts."

In holding that the ruling of the judge *at nisi prius*, rescinding the order for a removal of this cause before the intervention of a term of the federal court at which it could have been entered, was right in point of law and sound discretion, we do no more than declare, without arrogance or assumption, that, except by writ of error from the supreme court of the United States, whose judgment is conclusive upon all the judicial tribunals of the land, the jurisdiction of our own state courts is not to be reduced to "very inferior and insignificant proportions."

If the views which I have expressed are sustained by my brethren, the defendant's exceptions must be overruled. *Exceptions overruled.*

CUSHING, C. J., and SMITH, J., concurred.



## SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1875.]

MUNICIPAL BONDS. — CONDITIONAL AUTHORIZATION BY LEGISLATURE.  
— RECITAL IN BONDS THAT LEGISLATIVE REQUIREMENTS HAVE BEEN  
COMPLIED WITH.

## MARCY v. TOWNSHIP OF OSWEGO.

It must be taken to be a settled rule that where a municipal corporation has been authorized by legislative authority to subscribe for the stock of a railroad company, and to issue municipal bonds in payment of the subscription on the happening of some precedent contingency of fact, and where it may be gathered from the legislative enactment that the persons designated to execute the bonds were invested with power to decide whether the contingency had happened, their decision is final in a suit upon the bonds by a *bond fide* holder, and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive against the municipality.

Where, therefore, the bonds sued on contained recitals that the legislative requirements had been complied with in every respect, and it appeared that the recitals were consistent with the act by virtue of which the bonds were issued, the municipality was held to be liable.

MILLER, DAVIS, and FIELD, JJ. dissenting.

IN error to the circuit court of the United States for the District of Kansas.

Mr. Justice STRONG delivered the opinion of the court.

At the trial in the circuit court the plaintiff proved by competent evidence that the bonds, coupons of which were declared upon, were part of a series of bonds for one hundred thousand dollars, voted and issued by the township, and that they were so voted and issued in strict compliance with an act of the legislature of the state, approved February 25th, 1870, unless they were voted and issued in excess of the amount authorized by the act. It became, therefore, a question whether, in this suit, brought by a *bond fide* holder for value to recover the amount of some of the coupons, it could be shown, as a defence to a recovery, that at the time of voting and issuing the series of bonds, the value of the taxable property of the township was not, in amount, sufficient to authorize the voting and issuing of the whole series, amounting to one hundred thousand dollars.

To solve this question there are some facts appearing in the case which it is necessary to consider. The bonds to which the coupons were attached contained the following recital: "This bond is executed and issued by virtue of and in accordance with an act of the Legislature of the said State of Kansas, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved February 25th, 1870,' and in pursuance of and in accordance with the vote of three fifths of the legal voters of said township of Oswego, at a special election duly held on the 17th day of May, A. D. 1870." Each bond also declared that the board of county commissioners of the county of Labette (of which county the township of Oswego is a part) had caused it to be issued in the name and in behalf of said township, and to be signed by the chairman of the said board of

county commissioners and attested by the county clerk of the said county, under its seal. Accordingly, each bond was thus signed, attested, and sealed. Nor is this all. The bonds were registered in the office of the state auditor, and certified by him in accordance with the provisions of an act of the legislature. His certificate on the back of each bond declared that it had been regularly and legally issued; that the signatures thereto were genuine, and that it had been duly registered in accordance with the act of the legislature.

In view of these facts, and of the decisions heretofore made by this court, the first question certified to us cannot be considered an open one. We have recently reviewed the subject in the case of the town of *Coloma v. Eaves*, 3 Am. L. T. R. N. S. 235, and reasserted what had been decided before, namely, that where legislative authority has been given to a municipality to subscribe for the stock of a railroad company, and to issue municipal bonds in payment of the subscription, on the happening of some precedent contingency of fact, and where it may be gathered from the legislative enactment that the officers or persons designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary precedent to any subscription or issue of the bonds, their decision is final in a suit by the *bond fide* holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive. And this is more emphatically true when the fact is one peculiarly within the knowledge of the persons to whom the power to issue the bonds has been conditionally granted.

Applying this settled rule to the present case, it is free from difficulty. The act of the legislature, under which the bonds purport to have been issued, was passed February 25, 1870. Laws of Kansas, 1870, p. 189. The first section enacted that whenever fifty of the qualified voters, being freeholders, of any municipal township in any county should petition the board of county commissioners of such county to submit to the qualified voters of the township a proposition to take stock in the name of such township in any railroad proposed to be constructed into or through the township, designating in the petition (among other things) the amount of stock proposed to be taken, it should be the duty of the board to cause an election to be held in the township to determine whether such subscription should be made: provided, that the amount of bonds voted by any township should not be above such a sum as would require a levy of more than one per cent. per annum on the taxable property of such township to pay the yearly interest.

The second section directed the board of county commissioners to make an order for holding the election contemplated in the preceding section, and to specify therein the amount of stock proposed to be subscribed, and also to prescribe the form of the ballots to be used.

The fifth section enacted that if three fifths of the electors voting at such election should vote for the subscription, the board of county commissioners should order the county clerk to make it in the name of the township, and should cause such bonds as might be required by the terms of the vote and subscription to be issued in the name of such township, to be signed by the chairman of the board and attested by the clerk, under the seal of the county.

These provisions of the legislative act make it evident not only that the county board was constituted the agent to execute the power granted, but that it was contemplated the board should determine whether the facts existed which, under the law, warranted the issue of the bonds. The board was to order the election, if certain facts existed, and only then. It was required to act if fifty freeholders, who were voters of the township, petitioned for the election; if the petition set out the amount of stock proposed to be subscribed; if that amount was not greater than the amount to which the township was limited by the act; if the petition designated the railroad company; if it pointed out the mode and terms of payment. Of course the board, and it only, was to decide whether these things precedent to the right to order an election were actual facts. No other tribunal could make the determination, and the members of the board had peculiar means of knowledge beyond what any other persons could have. Moreover, these decisions were to be made before they acted, not after the election and after the bonds had been issued.

The order for the election, then, involved a determination by the appointed authority that the petition for it was sufficiently signed by fifty freeholders who were voters; that the petition was such an one as was contemplated by the law, and that the amount proposed by it to be subscribed was not beyond the limit fixed by the legislature.

So, also, the subsequent issue of the bonds containing the recital above quoted, that they were issued "by virtue of and in accordance with" the legislative act, and in "pursuance of and in accordance with the vote of three fifths of the legal voters of the township," was another determination not only of the result of the popular vote, but that all the facts existed which the statute required in order to justify the issue of the bonds.

It is to be observed that every prerequisite fact to the execution and issue of the bonds was of a nature that required examination and decision. The existence of sufficient taxable property to warrant the amount of the subscription and issue was no more essential to the exercise of the authority conferred upon the board of county commissioners than was the petition for the election, or the fact that fifty freeholders had signed, or that three fifths of the legal voters had voted for the subscription. These are all extrinsic facts, bearing not so much upon the authority vested in the board to issue the bonds as upon the question whether that authority should be exercised. They are all, by the statute, referred to the inquiry and determination of the board, and they were all determined before the bonds and coupons came into the hands of the plaintiff. He was, therefore, not bound, when he purchased, to look beyond the act of the legislature and the recitals which the bonds contained. It follows that the first question certified to us should be answered in the negative.

Such being our opinion respecting the first question certified, the second and third questions are immaterial and require no consideration.

*The judgment of the circuit court is reversed, and a new trial ordered.*

Mr. Justice MILLER, dissenting. We have had argued and submitted to us during the present term some ten or twelve cases involving the

validity of bonds issued in aid of railroads by counties and towns in different states.

They were reserved for decision until a late day in the term, and the opinions having been delivered in all of them within the last few weeks, I have waited for what I have thought proper to say by way of dissent to some of them until the last of these judgments are announced, as they have been to-day.

I understand these opinions to hold that when the constitution of the state or an act of its legislature imperatively forbids these municipalities to issue bonds in aid of railroads or other similar enterprises, all such bonds issued thereafter will be held void. But if there exists any authority whatever to issue such bonds, no restrictions, limitations, or conditions imposed by the legislature in the exercise of that authority can be made effectual, if they be disregarded by the officers of those corporations.

That such is the necessary consequence of the decision just read, in the cases from the State of Kansas, is too obvious to need argument or illustration. That state had enacted a general law on the subject of subscriptions by counties and towns to aid in the construction of railroads, in which it was declared that no bonds should be issued on which the interest required an annual levy of a tax beyond one per cent. of the value of the taxable property of the municipality which issued them.

In the cases under consideration this provision of the statute was wholly disregarded. I am not sure that the relative amount of the bonds, and of the taxable property of the towns, is given in these cases with exactness; but I do know that in some of the cases tried before me last summer in Kansas it was shown that the first and only issue of such bonds exceeded in amount the entire value of the taxable property of the town, as shown by the tax list of the year preceding the issue.

This court holds that such a showing is no defence to the bonds, notwithstanding the express prohibition of the legislature.

It is therefore clear that so long as this doctrine is upheld it is not in the power of the legislature to authorize these corporations to issue bonds under any special circumstances, or with any limitation in the use of the power, which may not be disregarded with impunity.

It may be the wisest policy to prevent the issue of such bonds altogether. But it is not for this court to dictate a policy for the states on that subject.

The result of the decision is a most extraordinary one. It stands alone in the construction of powers specifically granted, whether the source of the power be a state constitution, an act of the legislature, a resolution of a corporate body, or a written authority given by an individual. It establishes that of all the class of agencies, public or private, whether acting as officers whose powers are created by statute or by other corporations or by individuals, and whether the subject matter relates to duties imposed by the nation, or the state, or by private corporations, or by individuals, on this one class of agents, and in regard to the exercise of this one class of powers alone, must full, absolute, and uncontrollable authority be conferred on them or none. In reference to municipal bonds alone, the law is that no authority to issue them can be given, which is capable of any effectual condition or limitation as to its exercise.

The power of taxation, which has repeatedly been stated by this court to be the most necessary of all legislative powers, and least capable of restriction, may by positive enactments be limited. If the constitution of a state should declare that no tax shall be levied exceeding a certain per cent. of the value of the property taxed, any statute imposing a larger rate would be void as to the excess. If the legislature should say that no municipal corporation should assess a tax beyond a certain per cent. the courts would not hesitate to pronounce a levy in excess of that rate void.

But when the legislature undertakes to limit the power of creating a debt by these corporations which will require a tax to pay it in excess of that rate of taxation, this court says there is no power to do this effectually. No such principle has ever been applied by this court, or by any other court, to a state, to the United States, to private corporations, or to individuals. I challenge the production of a case in which it has been so applied.

In the *Floyd Acceptance Cases*, 7 Wall. 666, in which the secretary of war had accepted time drafts drawn on him by a contractor, which, being negotiable, came into the hands of *bond fide* purchasers before due, we held that they were void for want of authority to accept them. And this case has been cited by this court more than once without question. No one would think for a moment of holding that a power of attorney made by an individual cannot be so limited as to make any one dealing with the agent bound by the limitation, or that the agent's construction of his power bound the principal. Nor has it ever been contended that an officer of a private corporation can, by exceeding his authority, when that authority is express, is open, and notorious, bind the corporation which he professes to represent.

The simplicity of the device by which this doctrine is upheld as to municipal bonds is worthy the admiration of all who wish to profit by the frauds of municipal officers.

It is, that wherever a condition or limitation is imposed upon the power of those officers in issuing bonds, they are the sole and final judges of the extent of those powers. If they decide to issue them, the law presumes that the conditions on which their powers depended existed, or that the limitation upon the exercise of the power has been complied with, and especially and particularly if they make a *false recital* of the fact on which the power depends in the paper they issue, this false recital has the effect of creating a power which had no existence without it.

This remarkable result is always defended on the ground that the paper is negotiable and the purchaser is ignorant of the falsehood. But in the *Floyd Acceptance Cases* this court held, and it was necessary to hold so there, that the inquiry into the authority by which negotiable paper was issued was just the same as if it were not negotiable, and that if no such authority existed it could not be aided by giving the paper that form. In county bond cases it seems to be otherwise.

In that case the court held that the party taking such paper was bound to know the law as it affected the authority of the officer who issued it. In county bond cases, while this principle of law is not expressly contradicted, it is held that the paper, though issued without authority of law, and in opposition to its express provisions, is still valid.

There is no reason, in the nature of the condition on which the power depends in these cases, why any purchaser should not take notice of its existence before he buys. The bonds in each case were issued at one time, as one act, of one date, and in payment of one subscription. All this was a matter of record in the town where it was done.

So, also, the valuation of all the property of the town for the taxation of the year before the bonds were issued is of record both in that town and in the office of the clerk of the county in which the town is located. A purchaser had but to write to the township clerk or the county clerk to know precisely the amount of the issue of bonds and the value of the taxable property within the township. In the matter of a power depending on these facts, in any other class of cases, it would be held that before buying these bonds the purchaser must look to those matters on which their validity depended.

They are all public, all open, all accessible: the statute, the ordinance for their issue, the latest assessment roll. But in favor of a purchaser of municipal bonds all this is to be disregarded; and a debt contracted without authority, and in violation of express statute, is to be collected out of the property of the helpless man who owns any in that district.

I say helpless, advisedly, because these are not *his* agents. They are the officers of the law. Appointed or elected without his consent; acting contrary, perhaps, to his wishes.

Surely if the acts of any class of officers should be valid only when done in conformity to law, it is those who manage the affairs of towns, counties, and villages, in creating debts which not they but the property owners must pay.

The original case on which this ruling is based is *Knox County v. Aspinwall*, 21 How. 544. It has, I admit, been frequently cited and followed in this court since then, but the reasoning on which it was founded has never been examined or defended until now. It has simply been followed. The case of *The Town of Coloma v. Eaves*, *supra*, decided a few days ago, is the first attempt to defend it on principle that has ever been made. How far it has been successful I will not undertake to say. Of one thing I feel very sure, that if the English judges who decided the case of *The Royal British Bank v. Turquand*, on the authority of which *Knox County v. Aspinwall* was based, were here to-day, they would be filled with astonishment at this result of their decision.

The bank in that case was not a corporation. It was a joint-stock company in the nature of a partnership. The action was against the manager as such, and the question concerned his power to borrow money. This power depended in this particular case on a resolution of the company. The charter or deed of settlement gave the power, and when it was exercised the court held that the lender was not bound to examine the records of the company to see if the resolution had been legally sufficient.

This was a private partnership. Its papers and records were not open to public inspection. The manager and directors were not officers of the law, whose powers were defined by statute, nor was the existence of the condition on which the power depended to be ascertained by the inspection

of public and official records made and kept by officers of the law for that very purpose.

In all these material circumstances that case differed widely from those now before us.

It is easy to say, and looks plausible when said, that if municipal corporations put bonds on the market they must pay them when they become due.

But it is another thing to say that when an officer created by the law exceeds the authority which that law confers upon him, and in open violation of law issues these bonds, the owner of property lying within the corporation must pay them, though he had no part whatever in their issue and no power to prevent it.

This latter is the true view of the matter. As the corporation could only exercise such power as the law conferred, the issuing of the bonds was not the act of the corporation. It is a false assumption to say that the corporation put them on the market.

If one of two innocent persons must suffer for the unauthorized act of the township or county officers, it is clear that he who could, before parting with his money, have easily ascertained that they were unauthorized, should lose rather than the property holder, who might not know anything of the matter, or if he did, had no power to prevent the wrong.

Mr. Justice DAVIS and Mr. Justice FIELD concur with me in this opinion.

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## SUPREME JUDICIAL COURT OF MASSACHUSETTS.

(To appear in 119 Mass.)

### DEFECT IN HIGHWAY. — PRUDENCE IN DRIVING.

THOMAS HILL v. INHABITANTS OF SEEKONK.  
ELIZABETH HILL v. SAME.

In an action against a town to recover for injuries caused by a defective highway, which the town was bound to keep in repair, one of the plaintiffs, who were riding together in their carriage in the daytime, testified that the defect was a hole in the way, caused by the dropping down of the capstone of a culvert, that the other plaintiff was driving, and that he was not at the time looking ahead, but was looking as any other person would who was driving in a carriage. The plaintiff who was driving testified that she had no previous knowledge of the defect, that the horse was gentle and was walking at the time, and that she was then looking straight ahead. The evidence also showed that the road was rough, that there was mud and water upon it, and that there was room to pass safely upon the side of the way. One witness for the plaintiff testified that any one who was on the lookout could have seen the hole. The presiding judge, at the defendant's request, instructed the jury in substance, that if the plaintiffs in the daytime, and at a walk upon a broad and substantially level road, with ample width for passing by the hole, went into it, when it was conspicuous, obvious, and in plain sight, they were not in the exercise of due care, unless they show some excuse for their inattention to their track; and that the law requires of one riding in the daytime such attention to the road over which he is about to pass, as to see

large holes that are conspicuous, obvious, and in plain sight, unless some sufficient reason excuses the inattention, and refused to give the further instructions requested by the defendant, that no such excuse was offered or shown by the evidence in this case, and that there was no evidence in the case of due care on the part of the plaintiffs, or either of them. The judge, at the request of the plaintiffs, also instructed the jury that it was enough if the plaintiffs looked ahead in such a manner as persons of ordinary prudence usually do in riding upon a highway. The jury found for the plaintiffs. *Held*, that the last instruction was correct, that the other instructions were sufficiently favorable to the defendant, and that the case was rightly submitted to the jury.

ACTIONS OF TORT to recover for injuries occasioned by a defect in a highway, which the defendant was bound to keep in repair. The cases were tried together in the Superior Court, before *Wilkinson, J.*, who, after a verdict in each case for the plaintiff, allowed a bill of exceptions in substance as follows:

The plaintiffs were riding on the highway in an open wagon, with the horse at a walk, on Fast Day, April 3, 1873, and the accident occurred at about five o'clock in the afternoon.

Thomas Hill, one of the plaintiffs, testified that they were driving along, his daughter, the other plaintiff, having the reins; the horse was on the horse path and the wheels in the ruts; that the road at that time was rough, owing to the season; that there was mud and water in the road; that he had not seen the hole before; that he passed the place in the morning going to Providence, but was then leading his horse on the other side of the roadway, there being two carriage tracks, so that the horse was between him and this hole; that at the time of the injury the wagon went into the hole and brought up suddenly, because at the end it was abrupt, caused by the dropping down of the capstone of the culvert bridge; that he was then thrown out of the wagon by the striking of the wheel against the fallen capstone; that before that he had been looking the same as any other man riding in a carriage; that he was not looking to see a hole, and did not expect there was one there, and did not see it; that he was looking the same as any other man riding in a wagon; that his daughter, who was about twenty-four years old, had been accustomed to drive for many years.

*Cross-examined.* "The road was wide enough to go by safely, can't swear that I was looking at the road immediately before me; I saw the hole after I was thrown out; did n't see it before because I was n't looking at the road immediately before me; I can't say that I was looking right ahead just then; I was not exactly looking to see if the wheel was going into that place."

Elizabeth Hill, the other plaintiff, testified that she was accustomed to drive, and had been for years; that she was driving at the time; that the horse was a gentle one and was walking; that she had no previous knowledge of the defect in the road; that the wagon wheel went into the hole, and brought up abruptly where the capstone of the culvert had fallen in, and she was thrown against the horse, injuring her; that at the time she was driving along looking straight ahead with her eyes open, and the first she knew they were thrown out by the wagon getting into the hole; that the road was rough, and there was mud and water on the road; that she did not see the hole before they went into it.



*Cross-examined.* "Father said nothing to me about the hole, nor I to him before the accident. I did n't see the hole because I was not looking. I was not looking in the ruts to see where the wheels were going. The wagon did not leave the ruts. We were looking ahead all the time, and not over the side, and not in the ruts."

Henry H. Goff, for the plaintiffs, testified that there were deep ruts all along there full of mud and water; that he saw this hole in the road when he went out to help the plaintiffs; that the stone had caved in, and that it was eighteen inches deep from the top of the capstone. It was two or three feet from the top of the road to the bottom of the hole.

Ezekiel C. Cushing, for the plaintiffs, testified that he was riding on the road in the morning before the accident, and saw the hole because he rode into it; that the hole was at the place where the capstone fell down, and that where the capstone had fallen it was eighteen or more inches deep; that after the accident he filled the hole, and it took a one half ox-cart load of stones, and two thirds of a load of dirt on that to fill it; that the wagon must have gone into the hole gradually and brought up suddenly, where the stone had fallen in; that he dug away the earth and found the wall of the culvert had fallen down and the capstone had fallen in. The hole was four or five feet long and eighteen inches to two feet wide, and twenty-four inches deep. Any one could pass this hole that could drive. The road was broad and substantially level, and of ample width for two carriages to pass. There were no obstacles to the freest vision.

Leroy T. Bennett, for the plaintiffs, testified that he examined the place after the accident, and the cavity was from four to five feet long, fifteen inches wide, and he judged it eighteen or twenty inches deep; that he drove through it the Monday before.

David Allen, for the plaintiffs, testified that he saw the hole a few days before, and judged it to be about six feet long and eighteen or twenty inches wide; that he drove into it and was nearly capsized in the forenoon; and on his return avoided it.

James N. Goff, for the plaintiffs, testified: "Any man could have seen the hole if he had been upon the lookout. I saw it an hour or two before the accident." *Cross-examined.* "Any man could see it if he was n't a fool."

James E. Goff, for the plaintiffs, testified: "There was room enough to go by safely on the south side of the hole."

John C. Marvel, for the plaintiffs, testified: "I went by there the day before; remember it was a very bad hole; I turned out for it; say four feet long, and eighteen or twenty inches deep, with no water. I turned out and went right by."

Charles E. Jenks, for the plaintiffs, testified: "I went by in the afternoon of the day of the accident; saw the hole at the culvert; say eighteen inches wide, and eight inches deep. I saw it and turned out. It was no trouble to turn out and avoid the defect."

John Thacher, for the plaintiffs, testified: "There was some water in the ruts, but it had nearly settled. The hole was thirty inches deep. I measured it with a stick to the bottom of the culvert. I was walking on the road at the time."

The above was all the evidence in the case affecting these exceptions.

The defendant requested the judge to give the following instructions to the jury, the first two of which were given as requested, and the last two refused: —

“ 1. That if the plaintiffs, in the sunlight, and at a walk, upon a broad and substantially level road, with ample width for passing by the hole, went into a hole in a culvert bridge, which hole was three or four feet long, and two feet wide, and eighteen to twenty-four inches deep, conspicuous and obvious and in plain sight, they were not in the exercise of due care, or that care required of people driving on a road, unless they show some excuse for their inattention to their track.

“ 2. That the law requires of one riding in the daytime such attention to the road over which he is about to pass, as to see large holes that are conspicuous and obvious and in plain sight, unless some good and sufficient reason excuses the inattention.

“ 3. That no such excuse is offered in this case or shown by any evidence.

“ 4. That there is no evidence in this case of due care on the part of the plaintiffs, or either of them.”

At the conclusion of the charge the plaintiffs requested the following instruction to the jury, which was given, against the defendant's objection: “ It is enough if he looks ahead in such a manner as persons of ordinary prudence usually do in riding upon a highway.”

The case was submitted to the jury under instructions upon the duty of the plaintiffs to exercise due care, which were not excepted to otherwise than as above. The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

*T. M. Stetson*, for the defendants.

*W. H. Cobb*, for the plaintiffs, was not called upon.

BY THE COURT. The instruction that it was enough if the plaintiff looked ahead in such a manner as persons of ordinary prudence do in riding upon a highway was correct. The other instructions were, to say the least, sufficiently favorable to the defendant. The case was rightly submitted to the jury.

*Exceptions overruled.*

## SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1875.]

PATENT. — OF THE POWER OF THE COURTS TO GO BEHIND THE DECISION OF THE COMMISSIONER OF PATENTS ON THE QUESTION OF INVENTION. — INVENTION DEFINED AND DISTINGUISHED.

RECKENDORFER v. FABER.

The decision of the commissioner of patents in the allowance and issuance of a patent creates only a *prima facie* right, and is not conclusive upon the question of invention or patentability.

A combination of elements to constitute invention must involve more than convenience and utility, — there must be a new result produced by a new union. A combination that falls short of this is not the proper subject of letters-patent. Hence there is nothing patentable in the attachment of a piece of rubber to a lead pencil, although the two may be claimed as a combination and otherwise.  
Invention defined and illustrated.

**APPEAL** from the circuit court of the United States for the Southern District of New York.

Mr. Justice HUNT delivered the opinion of the court.

This is an appeal from a decree of the United States circuit court for the Southern District of New York, dismissing the bill of complaint, which was filed to restrain the infringement by the respondent of certain letters-patent, and for an accounting and damages. These patents relate to the manufacture of combined pencils and erasers.

1. The first was granted to Hymen L. Lipman, March 30, 1858, and was extended for a further term of seven years from the 30th of March, 1872.

The material parts of the specification are as follows : —

"I make a lead pencil in the usual manner, reserving about one fourth of the length, in which I make a groove of suitable size, *A*, and insert in this groove a piece of prepared india-rubber (or other erasive substance) secured to said pencil by being glued at one edge; the pencil is then finished in the usual manner, so that on cutting one end thereof you have the lead *B*, and on cutting at the other end you expose a small piece of india-rubber, *C*, ready for use, and particularly valuable for removing or erasing lines, figures, &c., and not subject to be soiled or mislaid on the table or desk.

"In making mathematical, architectural, and many other kinds of drawings, in which the lines are very near each other, the eraser is particularly useful, as it may be sharpened to a point to erase any marks between the lines; and should the point of the rubber become soiled or inoperative from any cause, such cause is easily removed by a renewed sharpening, as in the ordinary lead pencil."

The claim is as follows : —

"I do not claim the use of a lead pencil with a piece of india-rubber, or other erasing material, attached at one end for the purpose of erasing marks; but what I do claim as my invention, and desire to secure by letters-patent, is the combination of the lead and india-rubber, or other erasing substance, in the holder of a drawing pencil, the whole being constructed and arranged substantially in the manner and for the purposes set forth."

The drawings forming part of the specification exhibit a continuous sheath of uniform size, with interior grooves of different sizes; the eraser groove being larger than the lead groove.

2. The second patent is for an improvement upon the invention of Lipman, and was granted to Joseph Reckendorfer, the complainant, the 4th of November, 1862, and reissued on the 1st of March, 1872.

The material parts of the specification are as follows : —

"My invention is intended to provide a means whereby articles of greater size or diameter than the lead may be securely held in the head

of a pencil of otherwise ordinary or suitable construction without making the body of the pencil cumbrous or inconvenient. To this end my invention consists, —

“First. Of a pencil composed of a wooden sheath and lead core, having one end of the sheath enlarged and recessed to constitute a receptacle for an eraser or other similar article, as hereinafter stated.

“Second. Of a pencil, the wooden case of which gradually tapers from the enlarged and recessed head towards its opposite end for the whole or a portion of the length, as hereinafter set forth.

“The receptacle for the eraser or other article is formed in the head, without too much weakening the wood, owing to the form of the sheath, while for the same reason the end of the pencil which contains the ordinary lead is not cumbrous nor clumsy, but can be readily held between the fingers, just as an ordinary pencil is.”

Having thus described his invention, Reckendorfer claims, —

“1st. A pencil composed of a wooden sheath and lead core, having one end of the sheath enlarged and recessed to constitute a receptacle for an eraser, or other similar article, as shown and set forth.

“2d. A pencil, the wooden case of which gradually tapers from its enlarged and recessed head towards its opposite end for the whole or a portion of its length, substantially as shown and described.”

The points we propose here to discuss are two: —

First. Is the article patented by the plaintiff and his assignor, and for the infringement of which patents this action is brought, a patentable invention within the laws of the United States?

Second. Is it within the power of the courts to examine and determine this question, or is the decision of the commissioner of patents when, by issuing a patent, he decides that the invention is patentable, final and conclusive on the point?

The plaintiff contends that the decision of the commissioner is conclusive upon the point of invention, and that the question, as distinct from that of want of novelty, is one not open to the judgment of the court. In the natural order of things this question is the first one to be examined. For if it shall appear that the contention of the plaintiff is correct in this respect, the question in regard to the patentability of the instrument now before us will not arise. The point will have been decided for us, and by a controlling authority.

The “Act to revise, consolidate, and amend the statutes relating to patents and copyrights,” passed July 4, 1836 (5 U. S. Stats. 118), is the act regulating this case.

By the 6th section thereof it is enacted “that any person having invented or devised any new and useful art, machine, manufacture, or composition of matter not known or used by others before his invention or discovery thereof, and not at the time of his application for a patent in public use, or on sale with his consent or allowance as the inventor or discoverer, and shall desire to obtain an exclusive property therein, may make application in writing to the commissioner expressing such desire, and the commissioner, on due proceedings had, may grant a patent therefor. . . . He shall make oath that he believes himself to be the first inventor or discoverer thereof, and that he does not know or believe that the same has ever before been used.”

Looking at this section alone it may be safely said no one is entitled to a patent, unless (1.) he has discovered or invented an art, machine, or manufacture; (2.) which art, machine, or manufacture is new; (3.) which is also useful; (4.) which is not known or patented as therein mentioned. It is not sufficient that it is alleged, or supposed, or even adjudged by some officer to possess these requisites. It must in fact possess them, and that it does possess them the claimant must be prepared to establish in the mode in which all other claims are established, to wit, before the judicial tribunals of the country.

The 7th section of the act (p. 120) provides that on the filing of any such application, &c., and the payment of the duty required by law, the commissioner shall make, or cause to be made, an examination of the alleged new invention or discovery, and if on such examination it shall not appear to the commissioner that the same has been invented or discovered by any other person in this country prior to the alleged discovery, or patented or described in any foreign publication, or been in public use or on sale with the consent of the applicant, and if he shall be of the opinion that the same is sufficiently useful and important, the commissioner shall issue a patent therefor.

Before the commissioner is authorized to issue a patent it must appear to him that the claimant is justly entitled to a patent, i. e., that his art, machine, or manufacture possesses all the qualities before mentioned. The commissioner must also be satisfied that if it possesses these qualities, it is sufficiently useful and sufficiently important to justify him in investing it with the *prima facie* respect arising from the governmental approval. These restrictions are wise and prudent, are intended to secure at least a probable advantage to those who deal with the favorites of the government, for they may justly be so termed who receive the exclusive right of making, or using, or vending particular arts or improvements.

It is nowhere declared in the statute that the decision of the commissioner as to the extent of the utility or importance of the improvement shall be conclusive upon that point, but in the section just quoted it is placed in the same category with the want of novelty and the other requisites of the statute; and it is expressly conceded by the appellant that the judgment of the commissioner on the question of novelty is not conclusive, but that that point is open to examination. On that subject the practice of the courts is uniform in holding it to be subject to inquiry.

The plaintiff's counsel, in his brief, put his argument in this form: "The commissioner, then, passes on these questions: 1. Did the applicant himself make the invention? This question is settled by his oath." This is true to the extent and for the purpose of issuing a patent, and to this extent only. When the patentee seeks to enforce his patent, he is liable to be defeated by proof that he did not make the invention. The judgment of the commissioner does not protect him against the effect of such evidence. "2." (The counsel says) "was the invention new? This question is solved by the examination required by the act." To the same extent only. The defence of want of novelty is set up every day in the courts, and is determined by the court or the jury as a question of fact upon the evidence adduced, and not upon the certificate of the commissioner. "8." (The counsel says again) "is the invention sufficiently

useful and important? This the commissioner settles for himself by the use of his own judgment. It is a question of official judgment." These questions are all questions of official judgment, and are all settled by the judgment of the commissioner. His judgment goes to the same extent upon each question. He determines and decides for the purpose of issuing or refusing a patent. When the patent is sought to be enforced the questions, and each of them, are open to judicial examination. We see many reasons why all the questions of invention, novelty, and prior use should be open to examination in each case, and such we believe to be the course of the authorities and practice of the courts.

A reference to some of the most recent cases, and those decided by this court, will be sufficient. A review of all the cases in this court and the various circuit courts where this question has been alluded to will not be profitable.

In *Hotchkiss v. Greenwood*, 11 How. 248, a patent had been granted for a "new and useful improvement in making door and other knobs, of all kinds of clay used in pottery and of porcelain," by having the cavity in which the screw or shank is inserted, by which they are fastened, largest at the bottom of its depth in form of a dovetail, and a screw formed therein by pouring in metal in a fused state. The precise question argued in this court and decided, was of the patentability of this invention, and it was held not to be patentable. The only thing claimed as new was the substitution of a knob made of clay or porcelain for one made of wood. This it was said might be cheaper or better, but it was not the subject of a patent. The counsel for the defendants, in their points, there say: "The court now is called upon to decide whether this patent can be sustained for applying a well known material to a use to which it had not before been applied, without any new mode of using the material or any new mode of manufacturing the article sought to be covered by the patent." Mr. Justice Nelson delivered the opinion of the court to the effect already stated. Mr. Justice Woodbury dissented, not upon the question of the power of the court to pass upon the validity of the patent, but rather in regard to the manner in which the facts were submitted to the jury.

In *Stimpson v. Hardman*, 10 Wall. 117, it was decided that the engraving or stamping of the figure upon the surface of a roller for pebbling leather by pressure, where the use previously had been of a smooth roller, required no invention, that it was a change involving mechanical skill merely and not patentable. Mr. Justice Clifford dissented from the majority of the court, but expressly says that the question of patentability is for the decision of the jury and not for the court, upon a bill of exceptions. The majority of the court held that the question could be considered upon a bill of exceptions, and no one claimed that the decision of the commissioner concluded the question.

In *Hailes v. Van Wormer*, 20 Wall. 358, the question of the patentability of certain improvements in stoves was largely discussed in this court upon appeal from the circuit court for the Northern District of New York. It was held that if a new combination produces new and useful results, it is patentable, though all the constituents of the combination were known and in use previous to the combination. But the re-

sults must be the product of the combination, not a mere aggregate of several results, each the complete product of one of the combined elements. It was held that the facts there present did not create a compliance with this principle, and the judgment, that the plaintiff's bill be dismissed, was affirmed.

In *Rubber Tip Pencil Co. v. Howard*, 20 Wall. 498, the same principle was affirmed. In delivering the opinion the chief justice says: "The question which naturally presents itself for consideration at the outset of this inquiry is, whether the new article of manufacture claimed as an invention, was patentable as such. If not, there is an end of the case and we need not go farther." He makes a careful examination of the claim, and concludes that there is nothing patentable in the character of the invention. The decree of the court below dismissing the bill was unanimously affirmed upon that ground.

In *Smith v. Nichols*, 21 Wallace, 115, an elaborate opinion to this same effect was delivered by Mr. Justice Swaine, and concurred in unanimously by the court. The only question discussed is the patentability of the invention.

*Hicks v. Kelsey*, 18 Wall. 670, is a similar case. To this rule the case of *Lyman v. Osborne*, 11 Wall. 516, cited by the defendant, is no exception. The remarks there made are chiefly upon the subject of reissues, and are in accordance with the principles above set forth. Even as to reissues their conclusiveness is limited to questions of fact, and is accompanied by the statement that they are reëxaminable in court when it is apparent upon the face of the patent that the commissioner has exceeded his authority, or there is such a repugnance between the old and the new patent that it must be held as a matter of legal construction that the new patent is not for the same invention as that embraced and secured in the original patent (p. 543-44).

We do not attach much significance to the fact that the 15th section of the Act of 1836 allows the defendant to plead the general issue, and to give in evidence, upon thirty days' notice, special matter tending to prove the various matters therein referred to. The statute in that respect was intended to create an easy system of pleading, and to relieve from any doubt the admissibility in that form of the defences specified. The argument that because permission is given to prove under the general issue that the specification does not contain the whole truth, or that it intentionally and deceitfully contains too much, or that the patentee was not the first discoverer, or that it had been in prior use, it follows that proof that there is no invention or discovery at all, or that the invention has no importance, cannot be made, is quite unsound. Proof that there is no invention or discovery strikes at the root of the whole claim. The patent is based on an affirmative fact, of which this is the direct negative. It needed no statute to aid or justify this defence. It is provable when it exists under any general denial, like the fact of not guilty or non-assumpsit in cases where guilt or a promise is first to be established.

Upon the proposition that the decision of the commissioner on the question of invention, its utility and importance, is conclusive, and that the same is not open to examination in the courts, we are unanimously of the

opinion that the proposition is unsound. His decision in the allowance and issuance of a patent creates a *prima facie* right only, and upon all the questions involved therein, the validity of the patent is subject to an examination by the courts.

2. We come, then, to the question, Does the article patented by Lipman and improved by Reckendorfer involve an invention, or is it a product of mechanical skill or a construction of convenience only?

The article presented is for the performance of mechanical operations, to produce mechanical results, and is a mechanical instrument as much as a brush, a pen, a stamp, a knife, a file, or a screw. Whether it is styled a manufacture, a tool, or a machine, it is an instrument intended to produce a useful mechanical result, and the question presents itself, Does it embody any new device, or any combination of devices producing a new result?

In the first place, what is not claimed by the specification of Lipman is to be observed. "I do not claim," he says, "the use of a lead pencil with a piece of rubber attached at one end." Of course he does not claim a lead pencil as his invention, nor the use of a strip of india-rubber for erasure. Each of these articles had been in long and general use. But he claims as his invention "the combination of the lead and india-rubber in the holder of a drawing pencil," in the manner set forth. There is nothing peculiar in the manner set forth. The claim is simply of the combination of the lead and india-rubber in the holder of a drawing pencil; in other words, the use of an ordinary lead pencil, in one end of which, and for about one fourth of its length, is inserted a strip of india-rubber, glued to one side of the pencil. The pencil is to be made in the "usual manner," *i. e.*, he takes an ordinary lead pencil, and in this he makes "a groove of suitable size," giving no idea of what he deems a suitable size, and in this groove he inserts a piece of prepared india-rubber, which is glued to one edge of the pencil. "The pencil is then finished in the usual manner, so that in cutting one end thereof you have the lead *B*, and on cutting the other end you expose a small piece of india-rubber *C*, ready for use." It is evident that this manner of making or applying the instrument gives no aid to the patent. It must rest where the patentee claims to place it, that is, on the combination.

This combination consists only of the application of a piece of rubber to one end of the same piece of wood which makes a lead pencil. It is as if a patent should be granted for an article or a manufacture, as the patentee prefers to term it, consisting of a stick twelve inches long, on one end of which is an ordinary hammer, and on the other end is a screw-driver or a tack-drawer, or, what you will see in use in every retail shop, a lead pencil, on one end of which is a steel pen. It is the case of a garden rake, on the handle end of which should be placed a hoe, or on the other side of the same end of which should be placed a hoe. In all these cases there might be the advantage of carrying about one instrument instead of two, or of avoiding the liability to loss or misplacing of separate tools. The instruments placed upon the same rod might be more convenient for use than when used separately. Each, however, continues to perform its own duty and nothing else. No effect is produced. No result follows from the joint use of the two.



A handle in common, a joint handle, does not create a new or combined operation. The handle for the pencil does not create or aid the handle for the eraser. The handle for the eraser does not create or aid the handle for the pencil. Each has and each requires a handle the same as it had and required, without reference to what is at the other end of the instrument, and the operation of the handle of and for each is precisely the same whether the new article is or is not at the other end of it. In this and the cases supposed, you have but a rake, a hoe, a hammer, a pencil, or an eraser, when you are done. The law requires more than a change of form, or juxtaposition of parts, or of the external arrangement of things, or of the order in which they are used, to give patentability. *Curtis on Pat.* § 50; *Hailes v. Van Wormer*, 20 Wall. 353. A double use is not patentable, nor does its cheapness make it so. *Curtis*, §§ 56, 73. An instrument or manufacture which is the result of mechanical skill merely is not patentable. Mechanical skill is one thing. Invention is a different thing. Perfection of workmanship, however much it may increase the convenience, extend the use, or diminish expense, is not patentable. The distinction between mechanical skill, with its conveniences and advantages and inventive genius, is recognized in all the cases. *Rubber Tip Pen Co. v. Howard*, and other cases, *supra*; *Curtis*, § 72 b.

The combination, to be patentable, must produce a different force or effect, or result in the combined forces or processes, from that given by their separate parts. There must be a new result produced by their union. If not so, it is only an aggregation of separate elements. An instance and illustration is found in the discovery that by the use of sulphur mixed with india-rubber the rubber could be vulcanized, and that without this agent the rubber could not be vulcanized. The combination of the two produced a result or an article entirely different from that before in use. Another illustration may be found in the frame in a saw-mill which advances the log regularly to meet the saw, and the saw which saws the log; the two coöperate and are simultaneous in their joint action of sawing through the whole log; or in the sewing machine, where one part advances the cloth and another part forms the stitches, the action being simultaneous in carrying on a continuous sewing. A stem-winding watch key is another instance. The office of the stem is to hold the watch or hang the chain to the watch. The office of the key is to wind it. When the stem is made the key, the joint duty of holding the chain and winding the watch is performed by the same instrument. A double effect is produced or a double duty performed by the combined result. In these and numerous like cases the parts coöperate in producing the final effect, sometimes simultaneously, sometimes successively. The result comes from the combined effect of the several parts, not simply from the separate action of each, and is, therefore, patentable.

In the case we are considering the parts claimed to make a combination are distinct and disconnected. There is no new result not only, but there is no joint operation. When the lead is used, it performs the same operation and in the same manner as it would do if there were no rubber at the other end of the pencil. When the rubber is used, it is in the same manner and performs the same duty as if the lead were not in the same

pencil. A pencil is laid down and a rubber is taken up, the one to write, the other to erase; a pencil is turned over to erase with, or an eraser is turned over to write with. The principle is the same in both instances. It may be more convenient to have the two instruments on one rod than on two. There may be a security against the absence of the tools of an artist, or mechanic, from the fact that the greater the number the greater the danger of loss. It may be more convenient to turn over the different ends of the same stick than to lay down one stick and take up another. This, however, is not invention within the patent law, as the authorities cited fully show. There is no relation between the instruments in the performance of their several functions, and no reciprocal action, no parts used in common.

We are of the opinion that for the reasons given, neither the patent of Lipman nor the improvement of Reckendorfer can be sustained, and that the judgment of the circuit court dismissing the bill must be affirmed.

STRONG, J. I dissent from so much of the opinion of the majority of the court as holds that the instrument or manufacture described in the patents exhibits no sufficient invention to warrant the grant of a patent for it.

### COURT OF APPEALS OF MARYLAND.

(To appear in 42 Md.)

**EQUITY. — PARTIES IN PARI DELICTO. — DEGREES OF GUILT AS BETWEEN THE PARTIES TO A FRAUDULENT TRANSACTION. — ATTORNEY AND CLIENT.**

#### ROMAN v. MALL.

A bill was filed against a devisee to compel her to convey to the complainant certain real property, the legal title to which was held by her testator at the time of his death. The bill alleged in substance, that the testator acquired the title to the property in the capacity of agent and legal adviser of the complainant, and that he paid for it with the money of the complainant, and held it as his agent and trustee from the time of the purchase until his death. The evidence in the case, in the opinion of a majority of the court, showed that in the transfer and concealment of the property of the complainant in the name and apparent ownership of the testator, a gross fraud was perpetrated upon the creditors of the former; that the whole transaction was the joint scheme of the two—the one cooperating with the other and both being equally guilty—to withdraw and conceal the complainant's property from the pursuit of his creditors; that the object was accomplished, and the complainant got rid of his creditors by a composition founded upon his fraud and deception. *Held*, that the complainant could not obtain the aid of a court of equity to have the property restored to him.

There may be different degrees of guilt as between the parties to a fraudulent or illegal transaction; and if one party act under circumstances of oppression, imposition, undue influence, or at great disadvantage with the other party concerned, so that it appears that his guilt is subordinate to that of the defendant, the court, in such case, will relieve.

Where the parties to a fraudulent or illegal transaction are *in pari delicto*, the simple fact, that at the time of such transaction, the relation of client and attorney exists be-

tween them, will give the former no claim to the aid of a court of equity to have restored to him the property of which the latter has become possessed by their joint fraud. Such relation alone will not except the case from the general rule, *in pari delicto potior est conditio defendentis, aut possidentis*.

An attorney is under no actual incapacity to deal with or purchase from his client. All that can be required is, that there has been no abuse of the confidence reposed; no imposition or undue influence practised, nor any unconscionable advantage taken by the attorney of the client. When a transaction between parties occupying such relation to each other is brought in question, the onus of the case is cast upon the attorney of showing that nothing has happened in the course of the dealing which might not have happened had no such connection subsisted, and that the transaction has been fair in all respects. If the court be satisfied that the party holding the relation of client performed the act or entered into the transaction voluntarily, deliberately, and advisedly, knowing its nature and effect, and that no concealment or undue means were used to obtain his consent to what was done, the transaction will be maintained.

He who comes into equity must come with clean hands; and if a party seek to cancel or set aside an instrument, or be relieved of a transaction, or recover property on the ground of fraud, and he himself has been guilty of a wilful participation in the fraud, equity will not interpose in his behalf.

#### APPEAL from the circuit court of Baltimore City.

The bill of complaint in this case was filed by the appellee on the 28d of June, 1871, against the appellant. The opinions in the case, together with the argument of the appellant's counsel, furnish, it is thought, a statement of the case sufficient to illustrate the points decided by the court. The court below (Pinkney, J.) being of opinion that the complainant was entitled to the relief as prayed, decreed on the 20th of February, 1874, that J. Philip Roman, deceased, held the property situated at Locust Point, in the city of Baltimore, in "trust for the use and benefit of the complainant, from the date of its sale by George H. Williams, Esq., on the 18th of March, 1855, until the death of said Roman, and that since his death, the defendant hath held and now holds the said property in like manner, in trust for the use and benefit of the said complainant, subject, however, to the result of the account to be hereafter taken." It was further decreed that "the cause be referred to the auditor of the court to state an account between the parties, in accordance with the principles established and declared in the opinion of the court, of and concerning all moneys of the complainant used by the said J. Philip Roman, in the purchase and improvement of said property, and in paying the expenses incident to the possession and management thereof, and of and concerning any of his proper fees, charges, or other compensation for professional or other services rendered by him in respect to or in connection with the said property and trust, and all rents and profits of said property received by said Roman in his lifetime, and by the defendant since his death, and of and concerning all payments and disbursements made by said Roman in his lifetime, and by said defendant since his death, for and on account of the rents, issues, and profits thereof."

It was "further ordered, that the balance (if any) found to be due to the defendant, as executrix, or in her own right, upon the statement of said account, should constitute a lien upon said property and upon the rents, issues, and profits of the same in the hands of the receivers hereinafter appointed." William A. Fisher and George H. Williams, Esquires, were appointed receivers to take charge of the property and receive and collect the rents, issues, and profits thereof, &c.

By the decree the defendant, her servants, agents, and attorneys, were enjoined and prohibited from interfering, in any way, from and after the appointment and qualification of the receivers, with said property or with the rents, issues, and profits thereof, until the further order of the court.

From this decree the defendant appealed.

The cause was argued before Bartol, C. J., Stewart, Bowie, Brent, Miller, Alvey, and Robinson, JJ.

*George H. Williams & I. Nevett Steele*, for the appellant.

*Charles Marshall & S. Teackle Wallis*, for the appellee. The evidence in this case clearly establishes the fact, that Roman bought and held the Locust Point property for Mali. And this being established, we may consider the final issue, and in fact, the only issue in the case. That issue is as follows:—

The respondent pleads that her husband bought and held Locust Point for Mali, under an illegal arrangement between them to defeat the suits of certain persons in New York against Mali, and invokes for her protection in holding the property, the rule of law, that, as between parties to an illegal arrangement of this kind, standing *in pari delicto*, the court will refuse relief. This defence admits all that we claim as to the purchase and holding of the property by Roman for Mali.

We reply to this defence as follows:—

1st. That whatever illegality there was in the transaction, Roman was the counsel and adviser of Mali, and all that was done, was done under Roman's advice as counsel.

2d. That Roman constantly advised Mali that the claims of the New York suitors were unfounded, and could never be established; that the suits were intended only to levy black-mail; and that if Mali would put himself and his property in his (Roman's) hands, he would protect him and his property, and secure him against these unjust and unfounded demands.

3d. That Mali confided in this advice, and did put himself and his property and affairs, without reserve, in Roman's hands, as his counsel and legal adviser, believing, under the advice he had received, that he had the right to resist and defeat these demands in the way suggested by Roman, and implicitly obeyed all directions of Roman.

4th. That Roman, as Mali's counsel, assumed the direction of the suits against Mali, and took charge of all his property and affairs.

5th. That under Roman's management, the suits resulted in judgments against Mali, and thus furnished Roman with the means of setting up the defence of illegality in order to retain Mali's property.

6th. That Roman colluded with the parties who sued Mali in order to provide this very defence for himself, and thereby acquire all of Mali's property, and that in all that Roman advised Mali to do, his design was to lead him into a position which would enable Roman to hold on to the property on this infamous plea.

7th. That while conceding the truth of the general principle, that, as between parties *in pari delicto*, no relief will be given by the courts, that rule has no application to a case where the party, seeking to avail himself of it, stands in the relation of counsel and legal adviser of the other party. That when a lawyer advises his client to do an illegal act, by which the

lawyer gets possession of his client's property, a higher and more imperative rule of public policy demands that the court shall not sanction the infamous act of one of its own officers.

To meet this answer to her plea of the illegality of the arrangement between Roman and Mali, the respondent utterly denied that in all these transactions the relation of counsel and client existed between Roman and Mali.

That Roman was the counsel of Mali in the proceedings which resulted in the acquisition by the former of the title to the Locust Point property, is abundantly established by the evidence. There can be but little doubt that the case must depend upon the answer which the court will give to this question : —

Can a lawyer, a member of the Maryland bar, persistently advise his client dishonestly for years ; can he lead him into devious paths ; can he assume complete control of all his affairs, and by his advice and influence acquire all his property, in fraud of his client's creditors, and in fraud of his client, and when called to account for it, can he shelter himself behind his own falsehood and treachery by pleading the illegality of acts done under his own advice and professional direction ?

The truth of the maxim of law invoked by the appellant, — "*In pari delicto potior est conditio defendentis, aut possidentis*," is conceded ; and in a case where the parties to such a transaction as is disclosed in this case stand in *pari delicto*, that rule should be applied. But courts of equity and of law do not apply this rule invariably, but the parties must be *strictly in pari delicto*. The court will weigh the degrees of guilt, and will give relief when the party seeking it is less to blame than the other, or when it appears that one party may have *acted under circumstances of oppression, imposition, undue influence, or great inequality of condition, so that his guilt may be far less than that of his associate in the offence*.

Apart from Roman's position as the trusted friend and legal adviser of Mali, the evidence shows that he actually possessed unbounded influence over him.

The power of an attorney over his client in Maryland is almost unlimited. He can bind him as to third parties, and the client has no relief *except against the attorney*, if the latter injure him. *Bethel Church v. Carmack*, 2 Md. Ch. Dec. 148.

The advice of an attorney, honestly followed by his client, will protect the latter in a suit for malicious prosecution, although the advice may be erroneous.

It is surely against public policy that a man be arrested and prosecuted for an offence of which he is innocent ; and yet so sacred is the relation between counsel and client, and so essential is it for the public good that clients may confide in and follow the advice of their counsel, that even in a case of false imprisonment, a higher and more imperative rule of public policy demands that they shall be protected, even when they have wrongfully arrested and prosecuted an innocent man. This court has laid down the rule of policy applicable to persons standing in relations of confidence to each other in the strongest terms. *Todd v. Grove*, 33 Md. 148 ; *Story's Eq. Ju.* §§ 810 to 812 ; *Perry on Trusts*, §§ 202, 203, 205, and 846 ; *Story on Agency*, § 302.

For the honor of our profession, we claim that in this case there is no room for the application of the rule invoked by the respondent, to enable her to retain property to which her husband certainly had no right. See the following authorities: Hill on Trustees, 164; 1 Story's Eq. Ju. §§ 298-308 inclusive; Perry on Trusts, §§ 202, 214; 1 Fonblanque's Eq. book 1, ch. 4, § 4, note *y*; *Lester & Wife v. Howard Bank*, 38 Md. 558; *Freeman v. Sedwick*, 6 Gill, 29; Kerr on Injunctions, 51, 52, top; *Williams v. Bailey*, 1 Law Rep. H. of L. 200, 212; *Smith v. Bromley*, Douglas, 696; *Browning v. Morris*, Cowper, 790; *Osborne v. Williams*, 18 Vesey, 379; *Morris v. MacCulloch*, 2 Eden, 191, 192; *Law v. Law*, 3 P. W. 392; *Hatch v. Hatch*, 9 Vesey, 295; *Roche v. O'Brien*, 1 Ball & Beatty, 358; *St. John v. St. John*, 11 Vesey, 535, 536; *Reynell v. Sprye*, 1 DeG., Man. & G. 660; *Smith v. Bruning*, 2 Vernon, 392.

See also the following cases in the supreme court of the United States: *Harris v. Runnels*, 12 Howard, 79; *Walworth v. Kneeland*, 15 Ib. 353, 354; *Udell v. Davidson*, 7 Ib. 769.

These latter cases show that the party who endeavors to retain property, or to defend himself when sued, by the plea that the transaction is *against public policy*, has no right of his own, which is protected like rights resting on contract, but only enjoys immunity by reason of the disability to sue, which the policy of the law imposes on his adversary. If the policy of the law require that the defendant shall be punished, the courts will punish him, although by so doing they may confer an advantage upon a less guilty party. But the precise question in this case has been decided by the court of appeals of New York. *Ford v. Harrington*, 16 N. Y. 285. This case was followed by *Freelove v. Cole*, 41 Barbour, 318, and by the very recent case of *Goodenough v. Spencer*, 2 N. Y. Sup. Ct. Rep. 508, which is a case in which the client, as in this case, had been examined under proceedings supplementary to judgment, and had answered as in this case Mali did. See also *Bulkley v. Wilford*, 2 Cl. & Fin. 177, and 8 Bligh, N. S. 11.

Another principle is applicable to this case. It is settled that in cases where the defence of illegality is taken by a party to the illegal transaction, "if the foundation of the suit be something collateral to the illegal contract or transaction, and the plaintiff is not obliged to resort to this in order to maintain the suit, or to derive any aid from it, then the illegality of the original transaction is not a defence to the suit." *State v. B. & O. R. R. Co.* 34 Md. 364; Kerr on Injunctions, 52, top of page; *McBlair v. Gibbes*, 17 Howard, 232; *Watts v. Brooks*, 8 Vesey, 612; *Brooks v. Martin*, 2 Wallace, 70.

In the present case, the original arrangement by which Roman got Locust Point, was fully consummated before the claims against Mali had been established, and while Mali was acting under the belief, inspired by Roman's advice, that those claims were void. The arrangement only became illegal so far as Mali is concerned, by the use made of Roman's ownership, after the judgments had been recovered, and Roman's advice shown to be erroneous.

We seek to recover upon Mali's rights as a party to the original transaction, which was legal so far as he was concerned, and not on the basis of the fraudulent use subsequently made of that arrangement, to which

we need not resort to support our claim. With reference to all the pretended claims against Mali brought forward by the respondent without proof, we say that having established the relations of counsel and client between Roman and Mali, all benefits claimed by Roman from his client must be shown to have been fairly and honestly obtained, and the presumption is against their validity.

This principle will dispose of the argument attempted to be made to show that Roman had acquired half of Locust Point. *If he had a deed for it*, it would be *prima facie* void. Kerr on Injunctions, 45 and 46, top; Perry on Trusts, §§ 202, 203, 205, and 846; *Howell v. Ransom*, 11 Paige, 588; *Evans v. Ellis*, 5 Denio, 640; *Todd v. Grove*, 38 Md. 143.

There was a resulting trust in favor of Mali, arising from the payment of the purchase money of the property in question. Hill on Trustees, 91, margin; Lewin on Trusts, 130; *Harrisburg Bank v. Tyler*, 3 W. & S. 373; *Unitarian Society v. Woodbury*, 14 Maine, 281; *Harder v. Harder*, 2 Sandford Ch. R. 17; *Depeyster et al. v. Gould et al.* 2 Green Ch. 474; 2 Story's Eq. Ju. 1201; *Dryden v. Hanway*, 31 Md. 254; Perry on Trusts, § 133.

The proof of the existence of an account in Roman's books, in which Mali is charged with the purchase money of the property, against credits of money received by Roman for him, is a sufficient memorandum within the statute of frauds to establish the trust. *Cripps v. Jee*, 4 Bro. C. C. 472; *Prevost v. Gratz*, 1 Peters C. C. R. 366; *McCubbin v. Cromwell's Ex'or*, 7 G. & J. 157; Perry on Trusts, 82, 133, and cases cited.

ALVEY, J., delivered the following opinion, which was concurred in by Judges BOWIE and BRENT:

A careful examination of the record in this case cannot fail for a moment to convince any one that, in the transfer and concealment of the property of Mali, in the name and apparent ownership of Roman, a gross fraud was perpetrated upon the creditors of the former. But, in the view of a majority of this court, Mali was not less guilty in the intent and practice of that fraud than Roman; they were clearly, according to our apprehension, *in pari delicto*. And as this suit is in effect an application to a court of conscience, by one of the guilty parties, to have enforced the fraudulent and corrupt agreements, whereby he has succeeded in cheating and defrauding his creditors, we are decidedly of opinion that the court should withhold its aid.

We are not unmindful of the fact, that there are exceptions to the general rule, that courts of justice will not actively interpose for the relief of a party who has been *particeps criminis* in an illegal or fraudulent transaction; and that one of the exceptions is, where the party suing, although *particeps criminis*, is not *in pari delicto* with the adverse party. There may be different degrees of guilt as between the parties to the fraudulent or illegal transaction; and if one party act under circumstances of oppression, imposition, undue influence, or at great disadvantage with the other party concerned, so that it appears that his guilt is subordinate to that of the defendant, the court, in such case, will relieve. But we have examined the record in this case in vain to find any evidence whatever of those circumstances that should entitle Mali to the benefit of the exception to the general rule. On the contrary, it is most fully and

clearly shown that he was a man of intelligence, of large business habits and experience, and of considerable pretensions in the world, and by no means such a person as would be liable or likely to be inveigled, misled, or unduly influenced, by the fraudulent suggestions and advice of Roman. The whole transaction, from the beginning to the end, was the joint scheme of the two, the one coöperating with the other, and both being equally guilty, to withdraw and conceal Mali's property from the pursuit of his creditors; and having accomplished that object, and gotten rid of his creditors by a composition founded upon his fraud and deception, Mali now seeks to have the property restored to him, through the instrumentality of a court of equity; and that, too, after the lapse of sixteen or seventeen years from the time of the original perpetration of the fraud, and after the death of his confederate in the transaction.

Whether the relation of client and attorney, in its full and proper sense, existed between Mali and Roman at the time of the concoction of the fraud, admits of great doubt, whatever may have been the relation afterwards. Mali has sworn that no such relation did exist, and that Roman held no property in which he, Mali, was interested; and we think he should be forever estopped to deny the truth of his sworn testimony upon the subject. But even conceding that the relation of client and attorney did exist, we think there is no well established rule of law that requires, under the facts disclosed in this case, that the court should allow such effect to that relation as to form an exception to the general rule before stated. By so doing the attorneys would form a special class from which assignees would be sought in all cases where parties desired to cheat and defraud their creditors, by the assignment of their property. The general rule, by which all relief is withheld, might deter a party from conveying his property to an unprofessional person; but under the exception to that general rule, sought to be established in this case, if an unprincipled and fraudulent attorney could be found, the party could deal with him with impunity, being secure in the full protection of all the remedies administered by the courts, for the restoration of the property after the fraudulent object had been accomplished.

The general rule to which we have referred is most salutary and conservative, as a means of suppressing illegal and fraudulent contracts, and nothing should be done by the courts to weaken its force and operation. The suppression of such illegal and fraudulent transactions is far more likely, in general, to be accomplished by leaving the parties without remedy against each other, and thus introducing a preventive check, than by enforcing them at the instance of one of the parties to the fraud; and nowhere has this doctrine been more unqualifiedly adopted than in this State. *Stewart v. Iglehart*, 7 Gill & John. 132; *Freeman & Sedwick v. Sedwick*, 6 Gill, 28. Public morals, public justice, and the well established principles of judicial tribunals, alike forbid the interposition of the court to aid in the enforcement of a transaction like the present. The law leaves the parties to such transactions as it found them; and if either has sustained loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practised fraud, which, when detected, should deprive him of all anticipated benefit, or subject him to irrecoverable loss. *Bartle v. Coleman*, 4 Pet. 187.



Whether the confidential letter of Roman to his wife, exhibited in the record, contains such a declaration of trust in favor of Mali as may be enforced, we are not now called upon to decide, and in regard to which we intimate no opinion whatever; but the present bill will be dismissed without prejudice to any right that the appellee may have in that behalf.

*Decree reversed, and bill dismissed.*

STEWART, J., filed the following concurring opinion:—

From the proof adduced in the cause, there would be no difficulty in the establishment of the trust asserted in the bill, if the complicity of the complainant in the fraud to elude his creditors, did not incapacitate him, according to the well settled rules of law, from maintaining his claims.

Resulting trusts are expressly excepted, by the 8th section of the statute of frauds from its operation.

Both upon reason and authority, there is no doubt, parol proof of facts and circumstances may be adduced in a court of equity, to establish such trusts. *Dryden v. Hanway*, 81 Md. 254.

It is quite obvious that there is abundant evidence in this case to show that the property in question was mainly, if not entirely, purchased by means and moneys advanced to Roman by Mali.

It is equally manifest that these parties, Roman and Mali, were in fraudulent collusion to have the funds of the latter so invested in the property, as to evade the claims of his creditors.

Under such circumstances, that is, where two or more persons have been engaged in a fraudulent transaction to injure another, it is the established rule, that neither law nor equity will interfere to relieve either, as against the other, from the consequences of their misconduct. *Freeman v. Sedwick*, 6 Gill, 28.

This principle in the administration of justice has its foundation in reasons of public policy.

The courts have uniformly considered it the better and more effectual way to discourage fraud, not to interpose and adjudicate between the participants therein, except where their action may be necessary to counteract the fraud.

The contract between such parties is enforced or avoided, as may best answer that purpose.

To allow the complainant to succeed through the courts, in the recovery of the property in question, would not have the effect to counteract the fraud, but to render it successful. By permitting Roman to hold it, it is true he derives a benefit from the fraud; but that is through Mali's agency, and the court, as between them, will not interfere for the reasons stated.

As to the effect of the fraud upon the interest of both delinquents in such cases, if the courts had the power, probably the better disposition to make of property thus perverted, would be to condemn it to public uses, after satisfying any just claims thereon; and thus deprive both of any right to hold it.

That Mali was very much under the guidance and direction of Roman, as the leading and master spirit in the fraudulent conspiracy, would seem to admit of no doubt; but that he was influenced by him to such extent, as to excuse and relieve him from the operation of the rule, is a proposition not to be defended, except at the sacrifice of the rule.

To relax the rule in cases where the relation of counsel and client existed, in favor of the latter, and make his case *per se* an exception, would create a distinction without adequate reason. Whilst this has been done in some instances, in derogation of the general rule, its policy or justice may be well doubted. The uniform recognition of such exception might lead to pernicious results.

If the inequality of capacity between counsel and client were such as to render the latter excusable upon general grounds applicable to all parties, there would be no reason to make the special exception.

There might be cases when the converse of the proposition would be true, where the counsel might be under the superior influence of his more sagacious client.

It is not always the case that the counsel has more intelligence, or can exert more influence than the client.

Whilst an ignorant client, in the hands of more adroit counsel, might be entitled to some consideration; if it happened that the client in another case was the equal, or superior of his counsel, his exemption from the effect of the rule would be simply preposterous.

Unable to apprehend the propriety of deviating from the general rule, where the relation of counsel and client exist, upon any principle of public policy or sound reason, I can discover no ground for distinguishing this case.

The position of counsel, as a minister of the law, may be a circumstance to be considered with other facts, in deciding in any case, upon appropriate grounds, whether the rule ought to be applied.

Both parties here, according to the evidence, are properly *in delicto*.

Where they are *in pari delicto*, the rule "*potior est conditio defendentis*," strictly applies.

If they are *participes criminis*, although in different degrees, the rule on that account is not to be evaded; for no man can be permitted to set up his own iniquity, or its result, although less criminal than his confederate, as a ground of action, any more than his confederate can plead his, as a defence.

Where both parties are involved in the fraud, although the one, to some extent, under the influence of the other, and therefore, it may be, less guilty in the forum of absolute justice, it is not the province of the court, nor within their power, to exactly graduate their relative demerit or *delictum*; and because one is not quite so bad as the other, to relieve him of his disability under the rule.

That would impair the practical virtue of the rule, by metaphysical refinements, and the court could reach no satisfactory conclusion.

The duty of adjudicating between the comparative faults of contestants is not imposed upon the court; and it is not their province to determine mere moral questions.

Men are so differently constituted in their endowments and capacities, that there could hardly be a case where two or more parties were concerned in a fraud but that one would be in some degree under the influence of another.

To measure their precise relative criminality by the moral standard, where there are slight shades of difference, would be a difficult and specu-

lative undertaking, not necessary to the attainment of practical justice. Where the disparity between confederates in fraud virtually amounts to the irresponsibility of the one, the reason of the rule would cease to operate, and he should not be denied the right to maintain his action against the other. But if both are substantially or without reasonable extenuation *in delicto*, they must be treated as *in pari delicto*, where there are no other sufficient reasons, entitling the one to be relieved from the application of the rule. The court is not called upon to decide which was the worse man of the two, or which proved false to the other. See 2 Parsons on Contracts, 782.

Were they both grossly in fault, and is there anything fairly entitling the one to sue the other, notwithstanding the rule applicable to confederates in crime? are the questions involved.

Applying that rule, so firmly established, to the confederates in this fraud, considering all their relations and capacities, there would seem to be no other alternative, according to the facts in this case, but to leave the parties where, by their conduct, they have placed themselves in relation to the property in question.

For the purpose of eluding his creditors, Mali, having intrusted his funds to the keeping of Roman, and confided the management of the enterprise to him; if he has been deceived by his accomplice, upon what principle can he expect the courts to come to his aid and rescue him, in the absence of proof that such was the influence exerted over him, professionally or otherwise, by Roman, that he had not the power to resist it?

This has not been attempted, but the evidence exhibits him, the surviving victim of his own fraudulent complicity, asking to be relieved.

It is beyond the power of the court, governed by its established rules, to give him the relief sought by the bill. The decree of the circuit court must be reversed and the bill dismissed, without prejudice to any right he may be able to establish under the confidential letter of Roman to the respondent.

ROBINSON, J., filed the following dissenting opinion, in which Chief Judge BARTOL and Judge MILLER concurred:—

The bill in this case was filed against the appellant, as devisee of the late J. Philip Roman, to compel her to convey to the appellee certain property on Locust Point, in the city of Baltimore, the legal title to which was held by Roman at the time of his death.

It substantially alleges that Roman acquired the title to the property in the capacity of agent and legal adviser of Mali, the complainant; that he paid for it with the money of Mali, and that from the time of its purchase until his death, in 1871, he held it as agent and trustee of Mali.

The appellant, in her answer, denies all the material allegations in the bill touching the purchase of the property by Roman, as agent or legal adviser of Mali, relies upon the lapse of time and the entire absence of any written evidence of the title of Mali to this valuable property, and says if it should be established that Roman acquired the title to the property in pursuance of an agreement between him and Mali, for the purpose of concealing it from the creditors of Mali, the latter has no right to invoke the aid of a court of equity to restore to him the property thus fraudulently conveyed.

The law in regard to presumptive or resulting trusts, as applicable to the case before us, is too well settled to admit of much contention. It is sufficient to say, that in all cases where the conveyance of the legal estate is taken in the name of one person, while the consideration money is paid or furnished by another, the parties being strangers to each other, a resulting or presumptive trust arises by virtue of the transaction, and the person named in the conveyance will be held to be a trustee for the party from whom the consideration proceeds. And inasmuch as the statute of frauds extends to creations or declarations of trusts by parties only, and does not affect, indeed expressly excepts, trusts arising by operation or constructions of law, it is competent for the real purchaser to prove his payment by parol evidence, even though it be otherwise expressed in the deed.

In some of the earlier cases, it is true, a distinction was taken in regard to the nature and character of the proof, *before* and *after* the death of the *nominal purchaser*, and it was held in some of these cases, that after the death of the nominal purchaser, *parol evidence* alone was not sufficient to establish a trust against the express declarations in the deed. These cases, however, have been overruled, and it may now be considered settled law, that whatever effect the death of the nominal purchaser may have upon the weight of the testimony, it does not affect its admissibility.

In *Leach v. Leach*, 10 Vesey, 517, where the plaintiff after the death of her husband endeavored to establish a claim to a trust in an estate, on the ground that it had been purchased by her husband with trust money, Sir William Grant held, "that the question as to whether the purchase was made with trust money depended upon the proof of the fact; and whatever doubts may have been formerly entertained on the subject, it was now settled that money may be followed into the land in which it was invested; and that a claim of this kind may be established by parol evidence. It may be proper to say, however, that the proof in such cases ought to be of the most certain and satisfactory character."

The first question, then, to be determined is, whether the proof in this case conclusively shows that the property in question was purchased by Roman for and on account of Mali, and paid for with Mali's money?

[After stating the facts the learned judge continues as follows.]

We come now to the question, conceding that the legal title of the property was conveyed to Roman in pursuance of an agreement with Mali for the purpose of defrauding Mali's creditors, will a court of equity compel the appellant, as devisee of Roman, to reconvey the property thus fraudulently acquired? As between man and man standing upon an equal footing, we should not hesitate to say no. In such a case the maxim "*in pari delicto*" would apply in its fullest force. But this maxim, wise and salutary as it may be, is not one of universal application, on the contrary, it is subject to certain exceptions as binding in authority as the rule itself. We take the law to be well settled, that although both parties are *in delicto* it does not always follow that they stand *in pari delicto*; for there may be, and often are, very different degrees in their guilt. "One party may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age; so that his guilt may be far less in degree than that of his associate in the

offence, and in such cases public policy may require that relief should be granted, however reprehensible the acts and conduct of the parties may be." 1 Story's Equity Jurisp. § 300; *Osborne v. Williams*, 18 Vesey, 379; *Lord St. John v. Lady St. John*, 11 Vesey, 585; *Smith v. Bromley*, Doug. 696; *Browning v. Morris*, Cowper, 790; *Morris v. McCulloch*, 2 Eden, 191; 1 Fonblanque's Equity, book 1, chap. 4, § 4, note *y*.

The question then resolves itself into this, Does the testimony in the record before us prove such an inequality of condition between Roman and Mali, and the exercise of such an influence by the former over the latter, as to entitle the complainant to relief, although he may have been a party to the fraud relied on by the appellant? Now if there is one fact established beyond all controversy, it is, *that before and at the time of the sale of the property* in question, the relation of client and attorney existed between them. Further than this, the proof conclusively shows that in the long and protracted litigation growing out of the suits against Mali to recover damages on account of the over-issue of the Parker Vein Coal Company's stock, in the sale by Mali to Jewett of his interest in the Locust Point property, in the cunningly devised chancery proceedings under which the property was sold, in the examination of Mali under oath, and in the subsequent proceedings by Hicks the receiver, Roman was the master-spirit who planned, advised, and counselled every step by which he thus acquired possession of Mali's property, and prevented the judgment creditors from reaping the fruits of their judgments.

Before Mali sailed for Europe, and before the failure of the Parker Vein Coal Company, Roman incloses to him a power of attorney in the broadest terms, authorizing him to act as attorney. After the failure of the company, and when Mali was threatened with suits on account of an over-issue of stock, he writes:—

"Don't be frightened, they can't hurt a hair of your head."

Afterwards when Mali seeks his counsel and advice, he tells him "*to put all his property and the cases in his hands, follow his advice, and he would see him through.*" Other counsel it is true were employed in the New York cases, but they acted under the guidance and control of Roman.

To his confidential friend Spates he writes:—

"Proceed very slowly with your negotiations; I do hate to give them any money, or to allow them to get any advantage of us; it will not do to give judgments now. Feel your way carefully."

On the 18th of February, he writes again:—

"I will go to the library here to-morrow and examine all the New York decisions. I hope you will get Vanderpool's opinion, and if he suggests it, better get a written opinion from one of the tiptop lawyers."

Then again February 20th:—

"You had better break off negotiations for a while."

And on March 8d:—

"I think we will have to execute powers of attorney to confess judgment for about \$25,000. If you talk with them, tell them we are afraid of other suits, and propose that, as it will secure all their influence against additional suits. Talk largely about O'Connor's opinion that he can gain the suit."

The relation of client and attorney is one of truth and confidence, and in regard to transactions between parties occupying this relation, courts subject them to other and stricter tests than apply to the dealings between man and man standing upon an equal footing.

In *Ford v. Harrington*, 16 N. Y. 285, where an attorney advised his client to convey to him an interest in property, for a grossly inadequate consideration, for the purpose of defrauding the creditors of the client, promising at the same time to reconvey the property to the client, after an arrangement should have been made with the creditors, Bowen, J., said:—

“I think this is a case where, on account of the relations existing between the parties and the circumstances under which the contract was assigned, the court was called upon to interfere and compel the attorney to restore what he had acquired under the assignment, on being repaid what he had disbursed, although the object of the assignment was to perpetrate a fraud. The parties, although in ‘*delicto*,’ did not stand ‘*in pari delicto*.’ In the transaction, Conway was the mere instrument in the hands of the defendant. If an attorney will so far forget, or wilfully disregard his duty to the courts, whose license to practise he holds; to his clients, who, in consequence of such license, are induced to seek and act upon his counsel; and to the public, as, for the purpose of gain or profit to himself, to induce by his advice the commission of fraud by those who thus confide in him, he at least should be compelled to restore to his victim the fruits of his iniquity.”

The subsequent cases of *Freelove v. Cole*, 41 Barbour, 318, and *Goodenough v. Spencer*, 2 N. Y. Sup. Court Rep. 588, approve and sanction the doctrine thus laid down in *Ford v. Harrington*.

It is not necessary in this case to rest the right of the complainant to relief solely upon the relation of client and attorney. There is proof to show that owing to his troubles, the mind of Mali had in a measure become impaired, and it is impossible to read this record without seeing that from the time he first sought the counsel of Roman, the latter exercised the most unbounded influence over him.

To permit a lawyer who thus advises his client, harassed by suits for damages, that the claims are unfounded, and the suits instituted solely for the purpose of levying black-mail; who subsequently corruptly counsels him to put all his property in his hands, with the promise to see him safely through; and who, in the language of the learned judge below, leads his client “along the slippery paths of fraud and perjury,” to interpose the plea of *in pari delicto*, is, with due respect to the opinion of the majority of the court, a strange perversion of the principles of public policy, upon which that wise and salutary maxim is founded.

Appellee’s counsel thereupon moved for reargument assigning the following reasons in support thereof:—

The question presented for decision was not whether the court would give its aid to either of two parties who stand in *in pari delicto*, it having been conceded in the former argument that in such a case the court will leave the parties as it finds them. But the real question to be determined is whether, when both parties are *in delicto*, one of them being however, in the eye of the law, more guilty than his adversary, the court will not, upon grounds of public policy, give relief to the less guilty.

In deciding upon the question of the relative degrees of guilt between parties to an illegal transaction, for the purpose of applying this principle of law, it is submitted that the court does not consider the *actual relative capacity* of the parties, in order to determine which is the more in fault.

Relief in such cases is not granted because one party has availed himself of his personal superiority to oppress or defraud the other. When that state of facts is made to appear, the party oppressed or defrauded is entitled to relief *in his own right*, growing out of his situation.

But relief is granted on grounds of public policy, and is granted for the advantage of the public, and not of the party to whom it is given. The question of public policy in its application to such a case, arises from the *relation* in which the parties to the unlawful transaction stand towards each other, and not from their relative personal capacity to oppress or defraud.

The public is concerned in the maintenance of certain relations between parties in the strictest purity and integrity, irrespective of all considerations of their relative personal power and capacity. When those relations are shown to exist, the law concludes one party to occupy a position of superiority to the other, which cannot be used to gain an advantage for him who is thus presumed to be the superior.

Among the relations which public policy requires to be thus guarded is that of counsel, or legal adviser, and client; and when it appears that a lawyer has advised his client to do an unlawful act, by which the former has obtained possession of the property of the latter, the law presumes from the *relation* itself, without evidence as to which was *in fact* the more *capax doli*, and without weighing their actual personal capacity, that the parties do not stand in *pari delicto*, but the lawyer is the more guilty of the two.

This conclusion is drawn not in the interest of either party, but in the interest of the public, which requires the maintenance of the utmost integrity and good faith on the part of the legal adviser. In the language of Judge Story: "There may be on the part of the court itself a necessity of supporting the public interests, or public policy, in many cases, however reprehensible the acts of the parties may be." 1 Eq. Jur., sec. 300.

This principle is recognized by three of the judges who concur in reversing the decree below. They say: "There may be different degrees of guilt as between the parties to the fraudulent or illegal transaction, and if one party act under circumstances of oppression, imposition, undue influence, or at great disadvantage with the other party concerned, so that it appears that his guilt is subordinate to that of the defendant, the court in such case will relieve."

The minority of the court agree in this principle, and it is not questioned, except by one of the seven judges who heard the case. But in applying the principle, the three judges who united in the reversal are understood as deciding that, in order to ascertain the existence of that disparity in guilt on which relief will be granted to one of two guilty parties, we are to weigh their relative personal degrees of capacity, instead of inferring it from the relation in which they stand.

In other words, it is understood to be laid down, that if counsel and client engage in an illegal transaction, under the advice and direction of

the former, the court will inquire which of the two was actually the more capable of imposing upon the other, and to what extent the client was personally capable of resisting and preventing the fraud of his counsel; and if it appear that the client was the more capable, mentally or morally, or both, than his legal adviser, relief will be refused to the former against the latter.

It is submitted, that is not in accordance with the meaning or policy of the rule as stated by the majority of the court. It would result from such a principle of decision, that a lawyer may retain whatever he can get by advising a client of equal or superior capacity to his own, but that he will be made to restore what he gets by the same means from a client of less capacity.

The principle of the rule of public policy, as applied to the relation of counsel and client, would thus be made to depend, not upon the absolute inviolability of the fidelity and integrity of the relation of counsel, but upon the extent of the personal capacity of the client. Public policy has nothing to do with the degree of personal capacity that clients may possess. It is as much against public policy for a lawyer to defraud an experienced and sagacious client, as a weak and inexperienced one. Public policy demands that the protection of the client, in all cases, shall be found in the law which governs the relation itself, and that protection cannot be afforded, if the court permit the actual degree of personal capacity to be inquired into. The principle for which we contend, and the application of it in the manner we suggest, is well settled by authority. *Lester v. Howard Bank*, 33 Md. 562; 1 Story's Eq. Jur. sec. 308; *Scott v. Leary*, 34 Md. 390.

In the latter case, relief was given to a party to an illegal transaction, because his infirmity in guilt was conclusively presumed from the establishment of the *relation* between the parties (that of debtor and creditor), and there was no inquiry into the question of their actual relative degrees of capacity to enable the court to decide which was *in fact* the more guilty.

In *Austin's Adm'r v. Winston*, 1 Henning & Munford, 32, the court of appeals of Virginia gave relief to one of two parties to just such a transaction as this between Roman and Mali, upon the sole ground that it had been advised by a *creditor*, and that from the *relation* alone, the law presumed him to be more guilty than his debtor, who followed his advice. The court say: "It is said that Winston was probably indebted; that his conduct was a great violation of morality, in respect to his creditors; and that, in point of morality, he was most culpable. That Winston violated the principles of morality is already implied, in the admission that he had committed a fraud; but that fraud is palliated and excused by reason of the imbecility of his situation. But how does the case stand with respect to Austin? . . . To say the *least*, he hatched and brought to maturity a *free* and voluntary fraud to the injury of Winston's creditors; to say the truth, he capped the climax of his iniquity, by committing a double fraud towards his companion. So little regardful was he of the rules of morality, that he has not even observed a maxim sacred among thieves and felons, 'to be just and honest towards one another.'" p. 44.



The rule we contend for was applied in this instance because the parties to the fraud stood in the relation of debtor and creditor. In *Osborne v. Williams*, 18 Vesey, 379, Sir William Grant applied the rule to a case in which the parties stood in the relation of father and son, both having been concerned in a fraud upon the post-office laws.

See, also, *Reynell v. Sprye*, 1 DeG., Man. & G. 535. In *Ford v. Harrington*, 16 N. Y. 285, and in two decisions of the supreme court of New York (41 Barbour, 318, and 2 N. Y. Sup. Ct. Reps. 508 and 511), the rule for which we contend, was applied to the relation of counsel and client.

We submit that no authority can be found to sanction the contrary doctrine.

We also refer the court to the numerous decisions of tribunals of the highest resort at home and in England, cited in our original brief on the same question. Without discussing further than has already been done at the trial, the abundant evidence to be found in the record, that Roman concocted and executed the fraud in this case, and that Mali was a passive instrument in his hands, we submit that the court should allow a further argument upon the interesting and important subject above discussed, with a view to consider whether the opinion of the majority can be reconciled with the current of English and American decisions.

ALVEY, J., delivered the opinion of the court.

In disposing of applications for reargument, after the case has been acted on by the court and the judgment has been entered, this court has adopted the rule which obtains in the supreme court of the United States, as announced by the late Chief Justice Taney, in the case of *Brown v. Aspden*, 14 How. 25; *Kent v. Waters*, 18 Md. 53, 73; *Johns v. Johns*, 20 Md. 58. That rule is, that no reargument will be granted unless some member of the court, who concurred in the judgment, doubts the correctness of his opinion, and desires a further argument on the subject, and not then unless the proposition receives the support of a majority of the judges who heard the case (*Ambler v. Whipple*, October Term Sup. Court, 1874, not yet reported); and when that happens, the court will, of its own accord, apprise the counsel of its wishes, and if it does not desire to hear further argument on the whole case, will designate the points on which it desires to hear them.

In this case, very full and able arguments were heard at the bar, and elaborate briefs were filed by both sides; and it was not until after the most careful consideration and repeated conferences upon the subject, that the conclusions were announced at which the court arrived, though concurred in but by a bare majority of the judges who heard the case. This division of the judges, upon a question of so much importance, was certainly unfortunate, and very much to be regretted; but no judge who concurred in the judgment rendered is dissatisfied with his opinion, and therefore further argument is not desired; and, indeed, if further argument than that heard at the bar were desired, we have it, on the part of the appellee, in the elaborate printed argument in support of the motion for rehearing. This latter argument has been carefully examined and considered, but the judges who concurred in the judgment that has been rendered fail to find in that argument anything that causes them to doubt of the correctness of their previous conclusions.

In order, however, to avoid all possible misapprehension upon the subject, we deem it proper to state that the general rule governing transactions between client and attorney is in no manner designed to be questioned, or in the slightest manner qualified or impaired by the decision of this case. Over such transactions courts of equity exercise the most exact scrutiny, and are always disposed to view them with more than ordinary jealousy. But in this case, the simple fact that Roman was an attorney can make no difference in considering the transactions between himself and Mali; and even if it be conceded that the relation of client and attorney existed between them, the rule does not go the length of absolutely avoiding transactions between parties standing in that relation. The attorney is under no actual incapacity to deal with or purchase from his client. All that can be required is that there has been no abuse of the confidence reposed; no imposition or undue influence practised, nor any unconscionable advantage taken by the attorney of the client. When a transaction between parties occupying such relation to each other is brought in question, the onus of the case is cast upon the attorney of showing that nothing has happened in the course of the dealing which might not have happened had no such connection subsisted, and that the transaction has been fair in all respects. If the court be satisfied that the party holding the relation of client performed the act or entered into the transaction voluntarily, deliberately, and advisedly, knowing its nature and effect, and that no concealment or undue means were used to obtain his consent to what was done, the transaction will be maintained. Such is the rule as deduced from the best considered cases upon the subject, and which is said to be dictated from motives of public policy. *Gibson v. Jeyes*, 6 Ves. 266; *Montesquieu v. Sandys*, 18 Ves. 302; *Hunter v. Atkins*, 3 M. & K. 113; *Edwards v. Meyrick*, 2 Hare, 60; *Savery v. King*, 5 H. L. Cas. 627, 655; Sugd. on Ven. & Pur. (7 Amer. ed.) 895.

But this wise and salutary rule, instituted to promote honesty and fair dealing, and which the courts are always ready to uphold and enforce upon all proper occasions, was never designed to relieve a party in the position of the appellee in this case. It never contemplated relief to a dishonest client who has combined and confederated with his attorney to cheat and defraud his creditors. If the appellee occupied the position of a client whose confidence had been abused and taken advantage of in a transaction with his attorney, and the circumstances of his case were such as not to require him to allege and establish his own fraud, in order to reach and expose that of the attorney, the rule that has been stated would apply in its full force, and the court would not hesitate in granting relief.

But what is this case? In brief it is this. In a particular crisis in Mali's affairs, he desired to conceal and shield from the pursuit of his creditors his property, and to accomplish that object he combined with Roman, who was active in devising the fraudulent scheme whereby the property was effectually concealed and the creditors defrauded. The property was concealed under Roman's ostensible and acknowledged ownership; and that ownership was held out and maintained by both Mali and Roman under all circumstances against Mali's creditors, even to the extent of swearing, in the most positive and unequivocal manner, in a judicial pro-

ceeding, that Mali had no interest in the property whatever. Upon what terms or understanding this fraudulent combination between Mali and Roman was entered into, the record does not disclose; but the scheme was most adroitly executed and maintained by the parties for nearly seventeen years, and until all the creditors designed to be cheated had been induced to surrender their claims, upon the supposition that Mali had no property, on payment of some nine or ten cents in the dollar. During all this long period, Mali not only acquiesced in, but maintained, against the most searching efforts of his creditors, Roman's pretended ownership; and notwithstanding the many opportunities, and the strong honest incentives that should have induced him to withdraw from the combination, and expose the fraud, there is no suggestion that he had been misled, unduly influenced, or imposed on, until after Roman's death, when it was no longer feasible to maintain and carry on the fraudulent scheme that had been so effectually devised.

But it is said that Roman was Mali's legal adviser, and that he devised and concocted the fraudulent scheme, and counselled Mali's course in reference to it; and that, therefore, notwithstanding Mali's fraudulent conduct, he ought to have the benefit of the rule governing transactions between client and attorney, and be relieved on principles of public policy. Whether Roman, in his character of attorney, was retained, at the commencement of the transaction, as the legal adviser of Mali, certainly admits of great doubt upon the proof before us. Mali himself has sworn positively that Roman was not his attorney. But if it be conceded that the relation of client and attorney did exist, then it is manifest that Mali had but one object in retaining Roman as his counsel, and that was to obtain the aid and assistance that the latter could render in evading and defrauding his, Mali's, creditors; and though Roman was the more active of the two in planning and executing the fraud, yet Mali was all the while approving and coöperating in it, and supported it throughout. Both were, therefore, in the contemplation of law, equally guilty; and the counsel for the appellee do not deny, "that the evidence shows that Roman and Mali were parties to a miserable fraud, conceived in sin, and matured on perjury." It is also conceded by the counsel for the appellee, that neither party has shown any right *in himself* which a court of justice ought to respect, and in this we entirely agree.

Such, then, being the case, it falls directly within the well established principle, that he who comes into equity must come with clean hands; and if a party seeks to cancel or set aside an instrument, or be relieved of a transaction, or recover property, on the ground of fraud, and he himself has been guilty of a wilful participation in the fraud, equity will not interpose in his behalf. This principle, it has been said, is founded in the soundest wisdom and policy of the law, and it has been applied and enforced by the courts with great uniformity. It was upon this principle that the supreme court of the United States acted in the case of *Creath v. Sims*, 5 How. 192. In that case the court said: "The complainant alleges, that the obligation to which he had voluntarily become a party was intentionally made in fraud of the law, and for this reason he prays to be relieved from its fulfilment. This prayer, too, is preferred to a court of conscience, to a court that touches nothing that is impure. The condign

and appropriate answer to such a prayer from such a tribunal is this, — that, however unworthy may have been the conduct of your opponent, you are confessedly *in pari delicto*; you cannot be admitted here to plead your own demerits; precisely, therefore, in the position in which you have placed yourself, in that position we must leave you." And so we say to the appellee here.

*Motion for reargument denied.*

## SUPREME COURT OF THE UNITED STATES.

### MUNICIPAL BONDS. — NEGOTIABILITY. — RECITALS, ETC.

#### HUMBOLDT TOWNSHIP v. LONG *et al.*

Certain bonds contained the following recitals: "This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen County Railroad, and for the construction of the same through the said township, in pursuance of, and in accordance with, an act of the Legislature of the State of Kansas, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved February 25, 1870;' and for the payment of the said sum of money and accruing interest thereon, in manner aforesaid, upon the performance of the said condition, the faith of the aforesaid Humboldt township, as also its property, revenues, and resources is pledged." *Held*, that the building of the road was not a condition on which the payment of the bonds depended. *Marcy v. Township of Oscego* (3 Am. L. T. R. N. S., 295) approved. MILLER, DAVIS, and FIELD, JJ., dissenting.

IN error to the circuit court of the United States for the District of Kansas.

Mr. Justice STRONG delivered the opinion of the court.

The first question certified from the court below is whether the bonds to which the coupons in suit were attached are negotiable bonds, such as to entitle the plaintiff to the rights of a *bond fide* holder of negotiable paper taken in the ordinary course of business before maturity.

They are certificates of indebtedness to the railroad company, or bearer, each for one thousand dollars, lawful money of the United States, payable on a day certain, with interest at the rate of seven per cent., payable annually on the first days of January in each year, at a specified banking house, on the presentation and surrender of the respective interest coupons thereto annexed. If this were all, there could be no doubt of their complete negotiability. But it is said the subsequent language of the certificates controls the absolute promise, and shows that payment was to be made only on a contingency. This is argued from the recital contained in the instrument and from what follows it. We quote: "This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen County Railroad, and for the construction of the same through the said township, in pursuance of, and in accordance with, an act of the Legislature of the State of Kansas, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to

provide for the payment of the same, approved February 25, 1870 ;' and for the payment of the said sum of money and accruing interest thereon, in manner aforesaid, upon the performance of the said condition, the faith of the aforesaid Humboldt township, as also its property, revenue, and resources is pledged." Relying upon this clause of the certificate the township contends that the construction of the railroad through the township was a condition upon which the payment was agreed to be made. We think, however, this is not the true construction of the contract. The construction of the road as well as the subscription for stock were mentioned in the recital as the reasons why the township entered into the contract, not as conditions upon which its performance was made to depend. It was for the purpose of subscribing, and to aid in the construction of the road that the bond was given. The words "upon the performance of the said condition," cannot then refer to anything mentioned in the recital, for there is no condition there. A much more reasonable construction is that they refer to a former part of the bond, where the annual interest is stipulated to be payable at a banker's, "on the presentation and surrender of the respective interest coupons." Such presentation and surrender is the only condition mentioned in the instrument. But that stipulation presents no such contingency as destroys the negotiability of the instrument. It is what is always implied in every promissory note or bill of exchange, that it is to be presented and surrendered when paid. As well might it be said that a note payable on demand is payable upon a contingency, and therefore non-negotiable, as to affirm that one payable on its presentation and surrender is for that reason destitute of negotiability.

The next question certified is whether the bonds are invalid because of the fact that the election was held within less than thirty days after the day of the order calling for it.

The act of the legislature under which the bonds purport to have been issued, (passed in 1870,) is the act under which the bonds considered in the case of *Marcy v. The Township of Oswego* (3 Am. L. T. Reps., N. Y.) were issued. We held in that case that by its provisions the board of county commissioners, who caused the bonds to be issued, were constituted the authority to determine whether the conditions of fact, made by the statute precedent to the exercise of the authority granted to execute and issue the bonds, had been performed, and that their recital in the bonds, issued by them, was conclusive in a suit against the township brought by a *bond fide* holder. In so ruling we but decided what had often before been decided, and what ought to be regarded as a fixed rule. Applying it to the solution of the question now before us, it is plain that the bonds are not invalid because all the notice of the popular election was not given which the legislative act directed. The election was a step in the process of execution of the power granted to issue bonds in payment of a municipal subscription to the stock of a railroad company. It did not itself confer the power. Whether that step had been taken or not, and whether the election had been regularly conducted, with sufficient notice, and whether the requisite majority of votes had been cast in favor of a subscription, and consequent bond issue, were questions which the law submitted to the board of county com-

missioners and which it was necessary for them to answer before they could act. In the present case the board passed upon them and issued the bonds, asserting by the recitals that they were issued "in pursuance of and in accordance with the act of the legislature." Thus the plaintiff below took them, without knowledge of any irregularities in the process through which the legislative authority was exercised, and relying upon the assurance given by the board that the bonds had been issued in accordance with the law. In his hands, therefore, they are valid instruments.

The third question certified is answered by what was decided in the case of *Marcy v. The Township of Oswego, supra*, to which we have already referred. There is no essential difference between this case and that. The assessment rolls of the township may have been proper evidence for the consideration of the board of county commissioners when they were inquiring what the value of the taxable property of the township was, but the bonds are not invalid in the hands of a *bond fide* holder by reason of their having been voted and issued in excess of the statutory limit, as shown by the rolls. Whatever may be the right of the township as against those who issued the bonds, it cannot set up against *bond fide* holder of the bonds that the amount issued was too large, in the face of the decision of the board, and their recital that the bonds were issued pursuant to and in accordance with the Act of 1870.

The judgment of the circuit court is affirmed.

For dissenting opinion of Mr. Justice Miller, see page 297.

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## SUPREME COURT OF OHIO.

(To appear in 26 Ohio St.)

MORTGAGE. — USURY. — INTEREST UPON INTEREST.

CRAMER v. LEPPER.

Where one purchases land subject to a mortgage lien, and as part of the consideration, agrees to pay the mortgage debt, he cannot defend against the mortgage on the ground of usury.

Under a contract for the payment of interest at a specified rate annually upon default of payment, interest on the interest will be computed at six per cent.

MOTION for leave to file a petition in error to the district court of Summit County.

On the 25th of February, 1868, Philip Cramer executed his note to Samuel C. Taylor for \$2,500, payable five years after date, with interest at the rate of ten per cent. per annum, payable annually; and, to secure payment of the note, executed a mortgage on certain real estate situate in Summit county.

Afterward, on the 2d day of February, 1869, Cramer, by contract in writing, sold the mortgaged premises to Peter Lepper, and agreed to

convey the same in fee-simple on or before the 2d day of April, 1869; and, in consideration therefor, Lepper agreed to pay \$23,850, as follows: By the conveyance of a certain other tract of land to Cramer, \$9,000; by the transfer of certain notes, \$9,200; by his own notes bearing interest, \$3,150; and the balance of the purchase money was provided for in these words: "There is a lien on said Cramer's farm of twenty-five hundred dollars, held by a Mr. Taylor, which Peter Lepper agrees to pay."

On the 1st of April, 1869, Cramer executed and delivered to Lepper a deed in pursuance of the contract, in which the grantor covenanted that the premises were free and clear of all incumbrances, "except a mortgage claim of a Mr. Taylor for \$2,500, which Peter Lepper is to pay to said Taylor."

From time to time between the delivery of the deed and the 12th of March, 1874, Lepper paid to Taylor on his mortgage divers sums, amounting to \$2,675.73.

On the 25th of April, 1874, Taylor brought his action in the court of common pleas of Summit County, against Cramer and Lepper, to enforce his mortgage lien for the balance due on the note, including interest at the rate therein specified.

On the final hearing, at the May term, 1874, Cramer admitted the right of the plaintiff to recover according to the prayer of his petition, but Lepper resisted so much of the claim as was usurious. Thereupon, the court found the balance due on the mortgage in favor of the plaintiff, computing interest at the rate of ten per cent., payable annually, to be \$1,402.50, and decreed, upon failure of payment at a short day, the sale of the mortgaged premises.

Thereupon, the court proceeded to determine the rights of the defendants as between themselves, proper pleadings having been interposed for that purpose, in which Cramer claimed that Lepper was bound by the contract to pay the whole amount of the decree. Lepper on the other hand, claimed that, under the contract, he was bound to pay any balance that might be unpaid of the sum of \$2,500, and interest thereon from the 1st of April, 1869, at the rate of six per centum per annum, and no more.

Upon this issue there was introduced in evidence the contract of February 2, 1869, and the deed of 1st April, 1869, above named, together with an agreed statement, that Taylor's mortgage had been duly recorded, and that Lepper, at the date of the contract, had knowledge of the contents of the note and mortgage.

Thereupon, the court decreed that as between themselves, Cramer was bound to pay of the balance due to Taylor on his decree, the sum of \$275.20, and Lepper the balance, to wit, \$1,126.80.

On petition in error to the district court by Lepper, it was alleged that the common pleas erred: 1. In holding that Lepper was bound by his contract to pay to Taylor a greater sum than \$2,500, and interest thereon at the rate of six per cent. from and after April 1, 1869. 2. In not holding that Cramer was liable for interest on said sum of \$275.20 from and after the 1st of April, 1869.

The judgment of the court of common pleas was reversed by the district court, and this proceeding is to obtain a reversal of the judgment of the district court.

*H. W. Ingersoll*, for the motion. Usury is a defence personal to the debtor. It is not transferable or assignable. - No one but a party to a usurious loan, or his heirs, devisees, or personal representative, can avoid a usurious contract on account of usury. It cannot be set up by a stranger to the original transaction. *Ohio & Miss. R. R. Co. v. Kasson*, 37 N. Y. 218; *Bullard v. Raynor*, 30 Ib. 206; *Chamberlain v. Dempsey*, 36 Ib. 149; 10 Johns. 185; 9 Paige, 137; 10 Ib. 326; 2 Denio, 621.

The usurious mortgage was as much a part of the consideration as was all the purchase in excess of the mortgage. It entered into the contract as part and parcel thereof. The principal and interest, or amount represented by the mortgage together with the further price or value of the land, both make up the purchase by Lepper.

Usury, when made the consideration for another contract, is neither an illegal nor void consideration. *Bearce v. Barstow*, 9 Mass. 44; *Busby v. Finn*, 1 Ohio St. 409; *De Wolf v. Johnson*, 10 Wheat. 392.

A purchaser of land who takes by the terms of his conveyance, subject to a mortgage, cannot set up usury in the mortgage to avoid it. *Post v. Dart*, 8 Paige, 639; *Cole v. Savage*, 10 Ib. 583; *Levett v. Diamond*, 4 Edw. 22; *Wells v. Chapman*, 13 Barb. 561; *Sands v. Church*, 6 N. Y. 347; *Belmont v. Coman*, 22 Ib. 438; 24 Ib. 170; *Minor v. Terry*, 6 How. Pr. 211; *Union Bank of Massillon v. Bell*, 14 Ohio St. 200; *Burr v. Beers*, 24 N. Y. 178; *Brooks v. Avery*, 4 Ib. 225; *Lawrence v. Fox*, Ib. 268; *Thompson v. Thompson*, 4 Ohio St. 333.

*Edgerton, Kohler, & Campbell*, contra. Usury in the mortgage assumed by Lepper, is good as a defence by him to that extent. Ord on Usury, 131; *Post v. Dart*, 8 Paige, 639; 4 Comst. 225.

Lepper by his purchase acquired the same right to contest the validity of Taylor's mortgage, or the usury in it, that Cramer had. The fact that Cramer allowed judgment to be taken against him for the usurious claim, does not in any manner deprive Lepper from defending on his part against it. 9 Paige, 137; 13 Mass. 516; 15 Ib. 515; 1 Hilliard on Mortgages, 555; 14 Ohio St. 200; 17 Ohio, 339.

BY THE COURT. As between Taylor, the mortgagee, and Lepper, the grantee of the mortgagor, the latter must be regarded as the purchaser of the equity of redemption merely, and as such, he had no right to set up by way of defence that the note secured by the mortgage was usurious. The defence of usury in such case is personal to the mortgagor, and if waived by him, cannot be set up by his grantee, who assumes, in consideration of the grant, to pay the claim of the mortgagee. *Union Bank v. Bell*, 14 Ohio St. 201; *Green v. Kemp*, 13 Mass. 515; *Shufelt v. Shufelt*, 9 Paige, 137; *Morris v. Floyd*, 5 Barb. 130.

As between Cramer and Lepper, the vender and purchaser of the equity of redemption, we think the court of common pleas rightly construed their contract in holding Cramer to the payment of the interest which had accrued on the note and mortgage prior to April 1, 1869, the date of the conveyance. This construction is sustained in view of the fact that the amount of the mortgage debt assumed by Lepper is stated in the contract at \$2,500, the principal of the note only; and especially as the principal debt, excluding interest fully and exactly, when added to other specific sums agreed to be paid, amounts to the sum agreed as the price to be paid for the mortgaged premises.



And as between the same parties, it is clearly shown by the terms of their contract when considered in the light of the known facts, that Lepper's undertaking was to pay the principal of the note, with interest, after the date of the conveyance, at the rate therein specified, as part consideration for his purchase.

But we think the court of common pleas erred in not charging Cramer with the interest which accrued on the sum decreed against him from April 1, 1869, until the date of the decree. This sum, as we understand, was the interest which had accrued on the note before the date of the conveyance, and, as against Cramer, Lepper should have been released from interest accruing thereon. The rate of such accruing interest was six per cent., there being no agreement as to the rate of interest upon accrued interest. This being the rate to which Taylor was entitled, the same rate must be computed as between Cramer and Lepper.

For this error the judgment of the court of common pleas was rightly reversed, and hence this motion must be overruled.

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CIRCUIT COURT OF THE UNITED STATES. — NORTHERN  
DISTRICT OF GEORGIA.

[APRIL, 1876.]

CONSTITUTIONALITY OF THE AMENDATORY BANKRUPT ACT OF 1873.

IN RE SMITH.

The amendatory bankruptcy act of March 3, 1873, is not unconstitutional.

*Peeples & Howells*, for petitioner.

*Boynton & Dismake*, contra.

WOODS, J. This is a petition filed to reverse a decree of the district court in bankruptcy.

The facts of the case appear from the pleadings and evidence to be as follows: John W. A. Smith was adjudged a bankrupt by the district court in the Northern District of Georgia, on the 3d day of June, A. D. 1873. At the date of the adjudication the petitioner was the judgment-creditor of the bankrupt in the sum of \$——. The judgment bore date prior to the 21st day of July, 1868, when the present Constitution of Georgia went into effect, and was a lien upon the real estate of the bankrupt.

By an act passed prior to and in force in 1864, and in force when the debt due to petitioner was contracted, and which remained in force until the adoption of the Constitution of 1868, there was allowed to the head of a family, as a homestead, exempt from execution, fifty acres of land for each of his children under sixteen years of age.

By the Constitution of 1868, and by an act of the legislature, passed

October 3d, 1868, to carry the constitutional provision into effect, there was allowed to the head of a family a homestead of realty exempt from execution, of the value of \$2,000 (in specie).

The judgment of the petitioner against the bankrupt was duly proven and allowed as a debt against his estate prior to the 30th of June, 1874. On that day, the assignee in bankruptcy set off to the bankrupt his homestead, according to the provisions of the Act of 1864, namely: ninety acres of land, that being fifty acres and five acres in addition thereto for each child of the bankrupt under sixteen years of age. The bankrupt claimed that he was entitled to have assigned to him the homestead allowed by the Constitution of 1868, and the Act of October 3d, 1868, to wit: realty to the value of \$2,000 (in specie). He therefore filed with the register his objections to the assignment made by the assignee. The register referred the question thus raised with his opinion thereon, sustaining the objections of the bankrupt against the assignment, to the district judge, who also sustained the objections of the bankrupt, and held that he was entitled to have his homestead set off, under the provisions of the Act of October 3d, 1868, notwithstanding the fact that the debt of the objecting creditor was contracted and the judgment therefor a lien upon the realty of the bankrupt, before the change in the homestead law.

To review and reverse this decree of the district judge, is the purpose of the petition.

The case turns upon the constitutionality of the act of Congress approved March 3, 1873, entitled, "An act to declare the true intent and meaning of the act approved June 8, 1872, amendatory of the general bankrupt law. 17 Statute, 577; Rev. Statute, sec. 5045. This statute enacts, "that the exemptions allowed the bankrupt . . . shall be the amount allowed by the Constitution and laws of each state, respectively, as existing in the year 1871, and that such exemptions be valid against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court, any decision of any such court rendered since the adoption and passage of such Constitution and laws to the contrary notwithstanding."

To put the question clearly in view, it must be stated that after the adoption of the Constitution of 1868, and the passage of the Act of Oct. 3, 1868, to carry the exemptions provided for by the Constitution into effect, the supreme court of Georgia at its January term, 1873, in the case of *Jones v. Brandon* (48 Ga. 593), decided that the provisions of the Constitution and of the law, as far as they increased the exemption of property from execution, as against debts contracted before their adoption, was in conflict with that provision of the Constitution of the United States which declares "no state shall . . . pass . . . any law impairing the obligation of contracts (Constitution of the U. S. Art. 1, Sec. 10), and were, therefore, null and void. The same decision had, in effect, been previously made by the supreme court of the United States in the case of *Gunn v. Barry*, 15 Wallace, 610. It follows from this state of the law, as declared by the courts, that when the assignee undertook to set off the homestead of the bankrupt on the 30th of June, 1873, he was not authorized to set apart, as against Whitefield's administrator, any greater amount

of realty than was authorized by the Act of 1864, except as he derived his authority from the Act of Congress of March 3, 1873, above cited. In other words, there was no valid and operative state law by which the bankrupt could claim that he was entitled to a homestead of the value of \$2,000 (in specie), as prescribed by the Constitution and law of 1868.

The question, therefore, whether the Act of Congress, March 3, 1873, is constitutional, is vital to the decision of this case.

The objection to this act is not that it impairs the obligation of contracts, for Congress is not prohibited by the Constitution from passing such a law. *Evans v. Eaton*, Peters C. C. 238; *Satterlee v. Matthewson*, 2 Peters, 380; *Bloomer v. Stolley*, 5 McLean, 158. Besides the power expressly given to Congress "to establish uniform laws on the subject of bankruptcies throughout the United States," implies the power to impair the obligations of contracts. *Stephens v. Griswold*, 20 Wall. 603; *The Legal Tender Cases*, 12 Wall. 457.

The ground of objection is that the law is not uniform as required by the Constitution of the United States. In my judgment, a bankrupt law which adopts the exemption from execution prescribed by the laws of the several states is uniform so far as such exemptions are concerned. The exemptions may differ widely in different states, but such an act would apply a uniform rule, namely, to subject to the payment of the bankrupt's debts all his property not exempted by the laws of the state where in he resided. Upon this ground the original provision of the bankrupt, which adopted the state exemption laws in force in 1864, was declared to be uniform. *In re Beckerford*, 1 Dillon, 45.

But it is said that the Act of 1873 does not adopt the exemption laws as they exist in the states, but gives effect to all those which were upon the statute books of the states in 1871, even though some of them may have been declared unconstitutional, invalid, and inoperative by the state courts; that the operation of the act of Congress is therefore not uniform, because in some states the exemption allowed by the state laws is followed, while in others exemptions are permitted which the state laws, as interpreted by the courts, do not allow.

The same objection would apply to the original Bankrupt Act of 1867. That declared that the exemptions allowed by the state laws in force in 1864 should be allowed under the bankrupt act. The constitutionality of this provision has never been declared, and yet, before the 3d of March, 1867, the date of the bankrupt act, many of the states might have altered, amended, or repealed the exemption laws which were in force in 1864. Doubtless many of them did so before the passage of the Act of 1873. Yet the Bankrupt Act of 1867 undertook to give effect, not to the exemption laws as they existed at its passage, and as they might be thereafter altered or amended, but as they existed in 1864. So, if the original act was uniform, the amendment of 1873 must be uniform.

Had the bankrupt act made no exemption at all, or a horizontal one, as of such a number of dollars, or of certain specified articles, it would have been less uniform than the rule adopted in 1867 and 1873, because the contracts made in each state were subject to the implied condition that they could never be enforced against the property of the debtor exempted by the laws of such state; and a horizontal exemption would have

cut down contracts in one state and aided them in another, which would not have been uniform; that is, it would not have been paying uniform respect to the obligation of contracts made in different states.

Perhaps the most exactly uniform rule would have been to subject every contract to such an exemption as it was liable to when made. But that would not have been practicable, for the property of the same debtor would in many instances have been liable to different exemptions, and his property would always be taken by the claims which were subject to the least exemption, but only for the benefit of the owners of such claims, so that some creditors would get a larger percentage of their claims than others.

It appears, therefore, that the best thing Congress could do was to adopt the state exemptions existing at a recent day and likely to affect most contracts made by the bankrupt.

Congress has undertaken to say that all exemptions in force at a certain date by laws of the state shall have effect under the bankrupt act. I think this sufficiently meets the requirement of uniformity, and that, to make the law uniform, it was not necessary to enact that the bankrupt act should follow the shifting legislation of the states on the subject of exemptions, or the decisions of the state courts.

Thus the Bankrupt Act of 1867 continued the exemptions that were in force in Georgia in 1864, although those exemptions had been repealed and new ones established by the Act of October 3, 1868.

Suppose the Bankrupt Act of 1867 had declared that all exemptions by the state law in force at the date of its passage should have effect under the bankrupt act. That would clearly be a uniform enactment. Would it cease to be such and become unconstitutional merely because the legislature of a state had, at a subsequent time, amended its exemption laws, or the courts of another state had declared its exemption laws unconstitutional? I think it would not. In other words, I think Congress may adopt the state laws on the statute books of the state, at a particular date, in reference to exemptions, and that the legislation is uniform, although the laws in some of the states may afterwards be repealed by the legislature or declared null by the courts.

I am advised that a different view of the subject has been taken by the United States circuit court for the Eastern District of Virginia, *In re Deckert*, 1 American Law Times Reports, N. S. 326, in which case the Chief Justice of the Supreme Court pronounced the opinion. But, in passing upon the constitutionality of an act of Congress, all the presumptions are in favor of the law. While, therefore, disposed to yield great weight to this high authority, I cannot forget that in the opinion of the Congress of the United States this law is constitutional, and that the highest judicial authority has said that the courts ought not to pronounce a law unconstitutional unless its incompatibility be clear, decided, and inevitable. *Fletcher v. Peck*, 6 Cranch, 87; *Dartmouth College v. Woodward*, 4 Wheat. 625; *Livingston v. Moore*, 7 Peters, 546.

While I admit that the argument against the constitutionality of this act is plausible and persuasive, yet I cannot say that it is entirely convincing; it does not make the unconstitutionality of the act clear, decided, and inevitable.

Resolving doubts, therefore, in favor of the law, I must decline to declare it unconstitutional, and I must affirm the decree of the district court.

## SUPREME COURT OF NEVADA.

(To appear in 10 Nev.)

## CONSTITUTIONAL LAW. — ENACTING CLAUSE OF STATUTE. — CONSTITUTIONAL PROVISIONS CONCERNING, MANDATORY.

## STATE OF NEVADA v. ROGERS.

The provision of the section 23, art. 4, of the Constitution of Nevada, that the enacting clause of every law shall be as follows: "The People of the State of Nevada represented in Senate and Assembly do enact as follows," is mandatory. The omission of the words "Senate and" from the enacting clause of an act of the legislature, renders the act unconstitutional and void.

## APPLICATION for writ of mandamus before the supreme court.

By the Court, HAWLEY, C. J. This is an application for a writ of mandamus to compel the respondent, the county recorder of Elko County, to transcribe and deliver to relator, the county recorder of Eureka County, certain records, pursuant to the provisions of section 2 of the act entitled "An act to define and establish the boundary lines of Eureka County." Stat. 1875, 66.

Respondent claims that said act is unconstitutional and void. First, because it embraces more than one subject and because the subject of said act is not expressed in the title, as required by section 17, article 4, of the Constitution, which provides that: "Each law enacted by the legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title." Second, because said act has no enacting clause as required by section 23, article 4, of the Constitution, which provides that: "The enacting clause of every law shall be as follows: 'The People of the State of Nevada, represented in the Senate and Assembly, do enact as follows,' and no law shall be enacted except by bill."

The enacting clause of the act in question leaves out the words "Senate and" and reads: "The People of the State of Nevada, represented in Assembly, do enact as follows."

The first question to be determined is whether said provisions are directory or mandatory in their character.

In California, Ohio, Maryland, and Mississippi similar provisions of the Constitution have been held to be directory only. *Washington v. Page*, 4 Cal. 388; *Pierpont v. Crouch*, 10 Cal. 315; *Pim v. Nicholson*, 6 Ohio State, 177; *McPherson v. Leonard*, 29 Md. 386; *Swan v. Buck*, 40 Miss. 292. But in Alabama, Georgia, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Missouri, New Jersey, New York, Texas, and Wisconsin similar provisions have been recognized and enforced as mandatory by the courts, and in our judgment the whole current and weight of authority, as well as reason, is in accord with this view. The argument urged by relator, that we should follow the construction given by the supreme court of California prior to the adoption of our Constitution, has no force in its application to this case, from the fact that it cannot be

said that we borrowed these provisions exclusively from the Constitution of the State of California, when similar provisions are to be found in the constitutions of other states, where the courts had held them to be mandatory. This court has recognized and enforced section 17 as being mandatory (*State v. Silver*, 9 Nev. 230), and we see no valid reason for adopting a different rule in this case.

Judge Cooley in his work on Constitutional Limitations, after mentioning the fact that many of the provisions of the statutes of the several States have been held to be directory, says: "But courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules by which all departments of the government must at all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a constitution provisions which the people in adopting it have not regarded as of high importance and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end, especially when, as has been already said, it is but fair to presume that the people in their Constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication. There are some cases, however, where the doctrine of directory statutes has been applied to constitutional provisions; but they are at variance with the weight of authority upon the precise points considered, and we do not think, therefore, we should be warranted in saying that the judicial decisions, as they now stand, sanction the application" (p. 78).

The following authorities fully sustain the position, which we believe to be correct, that these and similar provisions of the Constitution are mandatory: *Tuskaloosa Bridge Co. v. Olmstead*, 41 Ala. 9; *Weaver v. Lapsley*, 48 Ala. 224; *Prothro v. Orr*, 12 Geo. 36; *Wolcott v. Wigton*, 7 Ind. 41; *Rice v. The State*, 7 Ind. 332; *The Indiana Central Railway Co. v. Potts*, 7 Ind. 682; *Walker v. Caldwell*, 4 La. Ann. 297; *The Board of Supervisors of Ramsey Co. v. Heenan*, 2 Minn. 331; *State v. Miller*, 45 Mo. 496; *The People v. Lawrence*, 36 Barb. 178; *The People ex rel. McConvill v. Hills*, 35 N. Y. 449; *Cannon v. Hemphill et al.* 7 Tex. 185;

*Antonio v. Gould*, 34 Tex. 49; *Durkee v. City of Janesville*, 26 Wis. 700; *Seat of Government determined*, 1 Wash. Ter. 186.

In *Tuskaloosa Bridge Co. v. Olmstead*, the court had under consideration the constitutional provision of Alabama that "No law . . . shall be . . . amended by reference only to its title, . . . but the law . . . amended shall itself be set forth at full length." It was there argued by eminent counsel that the provision was only directory, and was intended only as mere rules for the legislature, and that courts ought to "deviate a little from the received sense and literal meaning of the words, and interpret the instrument in accordance with what may appear to have been its reason and spirit." Such is substantially the argument advanced by relator's counsel here, and the decision is for that reason specially applicable to this case. Walker, C. J., in delivering the opinion of the court, said: "We have given careful attention to the argument that the clause of the Constitution under consideration is a mere rule of legislative proceeding, and does not render void a law not conformable to it. An anxious desire to allow effect to the will of the legislature, and to avoid a seemingly harsh visitation of a rule, the usefulness of which is hardly proportionate to its inconvenience, induced us to prolong our advisement on the case, with the hope of discovering reason or authority which would lead us to the support of that argument. But it still seems to us that the clause raises a question of legislative power, and is not a mere rule for the government of the general assembly in its proceedings. The prohibition is emphatic, that no law shall be revised or amended except in the mode specified. This is a command, not specially or professedly addressed to the legislature alone. It is as general and comprehensive as any prohibition in the Constitution. It is binding upon the executive, who approves or disapproves bills, and upon the judiciary, who declare the law, as well as upon the legislature. What warrant can there be, then, for the position that it is simply a rule for the guidance of the legislature? When the Constitution says no law shall be amended, save in a specified manner, can the legislature say a law may be and shall be amended in a different manner? The case is, to our minds, a plain one of irreconcilable conflict between the paramount law of the Constitution and the enactment of the legislature. When such a conflict is clearly presented to the judicial mind, the Constitution must prevail." We approve of the reasoning and conclusion of the learned chief justice who delivered the opinion of the court. The reasoning of that case was afterwards adopted and applied in *Weaver v. Lapsley*, where the court had under consideration the provision of the Constitution that declares: "Each law shall contain but one subject, which shall be clearly expressed in its title," and led the court "undoubtedly to the conclusion that the said section of the Constitution is imperative and mandatory, and a law contravening its provisions is null and void." If one or more of the positive provisions of the Constitution may be disregarded as being directory, why not all? And if all, it certainly requires no argument to show what the result would be. The Constitution, which is the paramount law, would soon be looked upon and treated by the legislature as devoid of all moral obligations; without any binding force or effect; a mere "rope of sand," to be held together or pulled to pieces at

its will and pleasure. We think the provisions under consideration must be treated as mandatory, and agree with Judge Cooley that "there are few evils which can be inflicted by a strict adherence to the law, so great as that which is done by the habitual disregard, by any department of the government, of a plain requirement of that instrument from which it derives its authority, and which ought, therefore, to be scrupulously observed and obeyed."

These provisions being mandatory in their character, it becomes our duty to consider whether they have been complied with.

Has this act an enacting clause, as required by the Constitution?

Cushing, in his work on *Law and Practice of Legislative Assemblies* (819, sec. 2102), says: "The constitutions of all the states in the Union, except those of Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, Georgia, Louisiana, Kentucky, and Arkansas, contain a statement, under the name of the enacting style, of the words with which every act of legislation in those states, respectively, must be introduced, sometimes with and sometimes without the use of negative words, or other equivalent language. The constitutions of the states above named, and of the United States, contain no statement of an enacting clause. Under those constitutions, therefore, an enacting clause, though equally requisite to the validity of a law, must depend mainly upon custom. The foregoing considerations seem to call for three remarks:

"I. Where enacting words are prescribed, nothing can be a law which is not introduced by those very words, even though others which are equivalent are at the same time used.

"II. Where the enacting words are not prescribed by a constitutional provision, the enacting authority must, notwithstanding, be stated; and any words which do this to a common understanding are doubtless sufficient; or the words may be prescribed by rule. In this respect much must depend upon usage.

"III. Whether, where enacting words are prescribed in a resolve or joint resolution, can such resolution have the force of law without the use of those very words, is a question which depends upon each individual constitution, and which we are not called upon at present to settle."

The question asked falls under the first sub-division discussed by Cushing.

In *McPherson v. Leonard*, *supra*, the majority of the justices of the court held that the words "by the General Assembly of Maryland," which were omitted from the enacting clause, were not of the essence and substance of a law, and that their use was directory only, and upon this ground refused to declare the act void. The statement that the words omitted are not of the essence and substance of a law is clearly erroneous, and the opinion is fallacious. How can it be said that these words are not of the essence and substance of a law, when the Constitution declares that the enacting clause of every law shall contain them? Two justices dissented from the opinion of the court, and held the provision of the Constitution to be mandatory. Justice Stewart, in his dissenting opinion, said, in alluding to the Constitution: "That instrument having expressly declared, in the twenty-ninth section of the third article, that 'The style of



all laws of the state shall be, "Be it enacted by the General Assembly of Maryland," it is incumbent on the law-making department to pursue that mode. If a positive requirement of this character . . . can be disregarded, so may others of a different character, and where will the limit be affixed or practical discrimination made as to what parts of the organic law of the state are to be held as advisory, directory, or mandatory? Disregard of the requirements of the Constitution, although, perchance, in matters of mere form and style, in any part, in law, may establish dangerous examples, and should, in all proper ways, be discountenanced. The safer policy, I think, is to follow its plain mandates in matters that may appear not to be material, in order that the more substantial parts may be duly respected. If those who are delegated with the trust of making the laws, from the purest motives improvidently omit the observances of the Constitution under any circumstances, such oversight may be referred to in future by others, with far different views, as precedents, and for the purpose of abuse. A higher responsibility is imposed upon those selected by the people for the discharge of legislative duty, and a greater obligation is demanded of them to exemplify, by their practice, a careful compliance with the Constitution. By a vigilant observance of its commands, the more reasonable is the probability that the best order will be secured. It is unnecessary to illustrate, by any argument, the soundness of this general consideration, which, I am sure, all will admit to be unquestionable, that a strict conformity is an axiom in the science of government. I certainly entertain such profound conviction of its truth, that I do not feel authorized to give my approval to this act as a valid law, but, on the contrary, am constrained to say, that the omission of the style required by the Constitution is fatal to its validity." 29 Md. 392.

In Washington Territory, an act was passed without an enacting clause, to locate the seat of government, and although the "organic act" passed by Congress creating the territory did not prescribe or require any enacting clause to be used in the passage of any law, the supreme court held the act to be unconstitutional and void for the want of an enacting clause. After quoting from Cushing, the court say: "The staring fact that the constitutions of so many states, made and perfected by the wisdom of their greatest legal lights, contain a statement of an enacting clause in which the power of the enacting authority is incorporated, is, to our minds, a strong and powerful argument of its necessity. It is fortified and strengthened by the further fact that Congress, and the other states, to say nothing of the English Parliament, have, by almost unbroken custom and usage, prefaced all their laws with some set form of words in which is contained the enacting authority." 1 Wash. Ter. 143.

Wyche, J., dissented from the opinion of the court, and in his dissenting opinion said: "The constitutions of nearly all, if not every state, prescribe some form for an enacting style, that is to say, some description of the law-making power. In such states it is conceded the prescribed forms must be followed, perhaps literally, at all events substantially." He refers to *Washington v. Page* (4 Cal. 388), where a provision of the Constitution was declared to be directory, and says it "is unsatisfactory and is not cited with approbation." He bases his dissent upon the ground

that the "organic act" did not require an enacting clause, and that if the legislature was compelled to use any "enacting style from the force of custom, that custom must be unbroken," and shows that no such custom existed in the territory. In *Swann v. Buck*, *supra*, the court discussed questions which belong to the third sub-division mentioned by Cushing. As an authority it has no application to the facts of this case, except in so far as the court held the law to be directory, a position which, in our judgment, for reasons we have already stated, is wholly untenable. The Constitution of Mississippi provides that the style of laws shall be: "Be it enacted by the Legislature of the State of Mississippi." The legislature passed a joint resolution in the following words: "Resolved by the Legislature of the State of Mississippi." The court, after admitting that it is necessary that every law should show on its face the authority by which it is adopted, held that the word "resolved" was as potent to declare the legislative will as the word "enacted," and further sustained the validity of the law upon the ground that as a joint resolution it had the force and effect of law.

In this case it is not contended that any equivalent words for those missing have been used, and there is no pretence that the act has the force or effect of law as a resolution. It is not necessary for us to hold, as laid down by Cushing, that nothing can be a law which is not introduced by the very words prescribed by the Constitution, for here there has not been a substantial compliance with the plain provision of that instrument. It is true, as was argued by relator's counsel, that all political power is inherent in the people. It is "the people" that enact all laws; but the laws, under the provisions of our Constitution, can only be enacted by the people when "represented in senate and assembly." These words, expressive of the authority which passed the law, are as necessary as the words, "the people," or any other words of the enacting clause. On its face the act purports to have been enacted by the people when represented in the assembly only. Without the concurrence of the senate the people have no power to enact any law. Every person at all familiar with the practice of legislative bodies is aware that one of the most common methods adopted to kill a bill and prevent its becoming a law, is for a member to move to strike out the enacting clause. If such motion is carried, the bill is lost. Can it be seriously contended that such a bill, with its head cut off, could thereafter by any legislative action become a law? Certainly not. The certificates of the proper officers of the senate and assembly, that such an act was passed in their respective houses, do not, and could not, impart vitality to any act which, upon its face, failed to express the authority by which it was enacted.

It was suggested by counsel for relator in his oral argument that when the bill was presented to the legislature, the enacting clause contained the identical words required by the Constitution, and that, after its passage, through the mistake of the enrolling clerk, the words "senate and" were omitted. We decided in *The State ex rel. George v. Swift*, *ante*, that we could not look beyond the enrolled bill in the office of the secretary of state in order to ascertain the terms of a law. The correctness of that decision has not been questioned, and under the rules therein established

we must take the act as we find it certified to by the officers whose duty it is to certify to the correctness of all laws that have been enacted. Our Constitution expressly provides that the enacting clause of *every law* shall be "The People of the State of Nevada, represented in Senate and Assembly, do enact as follows." This language is susceptible of but one interpretation. There is no doubtful meaning as to the intention. It is, in our judgment, an imperative mandate of the people in their sovereign capacity to the legislature, requiring that all laws to be binding upon them shall, upon their face, express the authority by which they were enacted, and as this act comes to us without such authority appearing upon its face, it is *not a law*.

The conclusion here arrived at renders it unnecessary to decide whether the act in question is subject to the further objections, urged by respondent's counsel, that the subject of the law is not expressed in the title, and upon that point we express no opinion.

*The writ of mandamus is denied.*

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## SUPREME COURT OF MICHIGAN.

[APRIL, 1876.]

USE OF PUBLIC HIGHWAY. — RIGHTS AND DUTIES OF THE PUBLIC. —  
USE OF VEHICLE MOVED BY STEAM POWER ON PUBLIC HIGHWAY.

### MACUMBER v. NICHOLS.

The use of steam power for purposes of locomotion on the common highways is not unlawful, provided due care is observed, and a proper regard had to the rights of others. The fact that one, for a lawful purpose, takes into the highway an object which is calculated to frighten horses of ordinary gentleness, does not necessarily render him liable for any resulting injury. Those who make use of the highway by means of horses have no rights superior to others, and new modes of locomotion are perfectly admissible, provided they are reasonably consistent with existing modes. If injury results, the question of liability is a question whether reasonable care has been observed; and this is a question of fact, and must be submitted to the jury as such.

COOLEY, J. This is an action on the case in which Nichols sought to recover for an injury, occasioned by his horse taking fright as he was driving along the public highway near Battle Creek about nine o'clock in the evening of September 9, 1874. The fright was caused by an engine mounted on wheels which the defendant was moving along the same highway by means of the steam power by which it was operated. The engine was used mainly for threshing, and was moved from place to place for that purpose. The travelled part of the highway at the place of the accident was about thirty feet in width, and Macumber gave evidence tending to show that he was moving on the extreme right of this travelled way, and that he shut off steam and stopped the engine when the horse was seen approaching. Each party claimed to be free from negligence himself, and charged negligence upon the other. The following instructions among others were given to the jury at the request of Nichols: —

"1. If you find that about the 9th day of September last the plaintiff was driving a well broken and gentle horse in the public street or highway in Battle Creek, in this county; that the defendant, by running a steam engine along said highway, caused plaintiff's horse to run away, and that plaintiff was thereby injured either in person or property, and that such steam engine was well calculated to frighten horses of ordinary gentleness, then the plaintiff is entitled to recover.

"2. The right to travel in a public highway is a right which is common to all, and no person has the right to impede or render dangerous the travel of the highway by any other person.

"3. A party placing upon the highway any vehicle unusual, and calculated from its appearance and mode of locomotion to frighten horses of ordinary gentleness, is liable for all damages resulting therefrom.

"4. It is no defence to this suit that the defendant was using the steam engine in the transaction of his lawful and legitimate business, if his use of the highway in such business rendered the highway dangerous for others to travel.

"5. The defendant had no right to run his steam engine on the public street or highway, if such engine was calculated to frighten horses of ordinary gentleness."

Other instructions of similar import were given, but the foregoing are all that need be stated to make clear the view which was taken by the circuit judge of the main point which was in controversy.

It is hardly probable that when the circuit judge told the jury that no person has a right to impede or render dangerous the travel of the highway by any other person, he intended them to understand this language literally and without qualification. Almost any proper use of a highway may under some circumstances impede the use by another, and possibly render it dangerous. The appearance of any unusual object in the streets may have some tendency to add to the dangers of travel by means of horses or other animals; and there is always more or less danger that a high spirited horse, or indeed any other horse, may become unmanageable, and people who are using the highway be exposed to risks in consequence. But it does not follow that the driver of such a horse is responsible for the consequences, because of his bringing him into the street impeding or rendering dangerous the travel by others. The question is one of reasonable use and reasonable care, and if these are observed, he is not chargeable. Probably the circuit judge did not intend to be understood as going beyond the requirement of reasonable care and caution on the part of all persons making use of the public ways; and this instruction, if it stood alone, would not have been likely to mislead.

But the instruction that any one placing upon the highway a vehicle unusual, and calculated from its appearance and mode of locomotion to frighten horses of ordinary gentleness, is liable for all damages resulting therefrom, is not only erroneous, but it could not fail to mislead. It was an instruction, in substance, that the placing of such a vehicle in the highway is always and under all circumstances an illegal act; a wrong in itself, for which an action will lie on behalf of any one who may chance to be injured in consequence.

Injury alone will never support an action on the case; there must be a

concurrence of injury and wrong. If a man does an act that is not unlawful in itself he cannot be held responsible for any resulting injury unless he does it at a time or in a manner or under circumstances which render him chargeable with a want of proper regard for the rights of others. In such a case the negligence imputable to him constitutes the wrong, and he is accountable to persons injured, not because damage has resulted from his doing the act, but because its being done negligently or without due care has resulted in injury. If the act was not wrongful in itself, the wrong must necessarily be sought for in the time or manner or circumstances under which it was performed, and injury does not prove the wrong, but only makes out the case for redress after the wrong is established.

Persons making use of horses as the means of travel or traffic by the highways have no rights therein superior to those who make use of the way in other modes. It is true that locomotion upon the public roads has hitherto been chiefly by means of horses and similar animals, but persons using them have no prescriptive rights, and are entitled only to the same reasonable use of the ways which they must accord to all others. Improved methods of locomotion are perfectly admissible if any shall be discovered, and they cannot be excluded from the existing public roads provided their use is consistent with the present methods.

A highway is a public way for the use of the public in general, for passage and traffic, without distinction. *Starr v. C. & A. Railroad Co.* 4 Zab. 597. The restrictions upon its use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement, and the inconveniences must be submitted to when they are only such as are incident to a reasonable use under impartial regulations. When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods; and it cannot be assumed that these will be the same from age to age, or that new means of making the way useful must be excluded merely because their introduction may tend to the inconvenience or even to the injury of those who continue to use the road after the same manner as formerly. A highway established for the general benefit of passage and traffic must admit of new methods of use whenever it is found that the general benefit requires them; and if the law should preclude the adaptation of the use to the new methods, it would defeat, in greater or less degree, the purpose for which highways are established.

It is not long since the great highways by water were supposed to be of such transcendent importance as to entitle those who made use of them to superior rights over those making use of other highways which might intersect them. Accordingly, bridges over navigable waters, when permitted at all, were required to be so constructed as to secure to vessels an uninterrupted passage, and the travel and traffic by land was compelled to await the convenience of the travel and traffic by water; but this rule was never inflexible; it was a rule that must yield to circumstances; and it was never a matter of course that the master of a vessel was entitled to a remedy as for a legal injury when the convenience of one making use of a bridge was preferred to his. The case was one in which rights must be harmonized, and unavoidable inconveniences to one party or the other

must be submitted to as something inseparable from any employment of the powers of government to provide or regulate the channels for travel and commerce. There may be, in any case in which a highway by land intersects a highway by water, questions of difficulty as to whether, in view of all the circumstances, the one or the other is of the greater importance, and whether the general public would be better accommodated by compelling those making use of the one to submit to temporary inconvenience for the accommodation of those passing or moving property by the other, or, on the other hand, by recognizing in the former such paramount rights as are not to be narrowed or encroached upon by any rights possessed by the latter. Over unimportant streams a bridge may do far more to accommodate the public than the navigable privilege; and the unreasonableness of a refusal to recognize the fact when legal rights are found to depend upon it, is very manifest. The paramount rights which have been asserted on behalf of vessel owners as against railroad companies have been very distinctly denied; the courts holding that they must submit to any incidental inconvenience that may be inseparable from allowing to the public the benefits of improved locomotion by land. *Works v. Junction R. R.* 5 McLean, 425, 438; *Spooner v. McConnell*, 1 McLean, 837, 879; *Jolly v. Terre Haute Bridge Co.* 6 McLean, 237, 242; *Miss. & Mo. R. R. Co. v. Ward*, 2 Black, 465. It follows that a bridge over a navigable stream is not of necessity a nuisance; it may or may not be such, according to the circumstances; and the vessel owner who brings his suit for an injury occasioned by it must show the circumstances which make the injury fairly chargeable to some one as a wrong.

But the bringing of an unsightly object into the common highway is no more of a wrong, because of its tendency to frighten horses of ordinary gentleness, than is the construction of a bridge over a river a wrong, because of its tendency to delay vessels. The one may be a wrong under some circumstances, and so may the other; but it is equally true that both may be proper and lawful under other circumstances. It would be difficult to pass through the streets of our large towns without encountering objects moving along them which are well calculated to frighten horses of ordinary gentleness until they become accustomed to them, but which, nevertheless, are used and moved about for proper and lawful purposes. The steam-engine for protection against fire may be mentioned as one of these; and though this is usually owned and moved about by public authority, there can be no doubt of the right of a private individual to keep and use one for his own purposes, and to take it through the streets where necessary. But other things which are sometimes moved about on wheels along the streets are equally alarming to horses when first used. Wild animals collected and moved about the country for exhibition are always more or less likely to frighten domestic animals, but they may nevertheless be lawfully taken on the public highways under proper precautions.

It has justly been remarked by the supreme court of Illinois, in a case involving the right to make use of steam as a means of locomotion in the public streets, that "a street is made for the passage of persons and property, and the law cannot define what exclusive means of transportation and passage shall be used." "To say that a new mode of passage shall be banished from the streets, no matter how much the general good may

require it, simply because the streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present age." *Moses v. P. F. W. & C. R. R. Co.* 21 Ill. 516, 523. In some of the large cities of the country sufficient means of transit by the old methods have become practically out of the question, and steam power is permitted as a matter of necessity, not only as a means of moving vehicles by the side of teams in the streets, but also over their heads, where the liability to cause fright would perhaps be still greater. Horses of ordinary gentleness would at first be liable to take fright, but after a time they become accustomed to the objects that at first are so fearful to them, just as in the country they become accustomed to see trains of cars passing near them along the ordinary railways, which sometimes for a considerable distance run in immediate proximity to the common roads. Horses may be, and often are, frightened by locomotives in both town and country, but it would be as reasonable to treat the horse as a public nuisance, from his tendency to shy and be frightened by unaccustomed objects, as to regard the locomotive as a public nuisance, from its tendency to frighten the horse. The use of the one may impose upon the manager of the other the obligation of additional care and vigilance beyond what would otherwise be essential, but only the paramount authority of the legislature can give to either the owner of the horse or the owner of the locomotive exclusive privileges. If one in making use of his own means of locomotion is injured by the act or omission of the other, the question is not one of superior privilege, but it is a question whether under all the circumstances there is negligence imputable to some one, and if so, who should be held accountable for it.

In the circuit court instructions were given on the subject of mutual negligence, which are probably unexceptionable; but they seem to have been entirely unimportant, because the other instructions, which treated the use of the engine in the public highway as unlawful, necessarily disposed of the case. We think the instructions last mentioned were erroneous. The engine as a means of locomotion in the highway was not necessarily a nuisance. It might possibly be a nuisance at some times and under some circumstances; and even where it might be proper to make use of it, the manager or owner might be liable to damages for negligence in management to the injury of others. But the question in any such case must be one of fact—a question of reasonable conduct and management on the part of both parties—and should be submitted to the jury as such.

*The judgment must be reversed, with costs, and a new trial ordered.*  
The other justices concurred.

## CIRCUIT COURT OF THE UNITED STATES.—DISTRICT OF KANSAS.

[JUNE TERM, 1876.]

NATIONAL BANKS.—REV. STATS. SECS. 5197, 5198 CONSTRUED.—RATE OF INTEREST.—RIGHT OF ACTION TO RECOVER BACK ILLEGAL INTEREST PASSES TO ASSIGNEE IN BANKRUPTCY.—EXTENT OF RECOVERY.

CROCKER, Assignee, v. FIRST NATIONAL BANK OF CHETOPA.

1. A national bank located in Kansas charged and received interest at the rate of 18 per cent. per annum : *Held*, that it was liable under the National Banking Act (Rev. Stats. secs. 5197, 5198) to pay back twice the amount of interest thus received.
2. If the person who paid such illegal interest is adjudged a bankrupt, the right of action passes to his assignee in bankruptcy, such assignee being his "legal representative" within the meaning of sec. 5198 of the Revised Statutes.
3. The amount of the recovery is twice the full amount of interest paid, and is not limited to twice the *excess* of interest paid over the legal rate.

THIS is an action by an assignee in bankruptcy, brought in 1875, to recover from the defendant, a bank organized under the act of Congress commonly known as the National Banking Act, double the amount of interest which he charges was taken from the bankrupts by the defendants upon numerous transactions after 1872 and prior to the bankruptcy. The petition charges in each count that the interest charged was "a greater rate of interest than was allowed by the laws of the State of Kansas."

It is material to inquire what was the law of the State of Kansas in regard to interest, during the period covered by the counts not barred by the statute. To properly understand the Kansas interest law, it is necessary to begin with the General Statutes, 1868, chapter 51, page 525, which contain the following:—

"Sec. 2. The parties to any bond, bill, promissory note, or other instrument of writing for the payment or forbearance of money, *may stipulate therein for* interest receivable upon the amount of such bond, bill, note, or other instrument, at any rate not exceeding *twelve per cent.* per annum.

"Sec. 3. All payments of money or property made by way of usurious interest, or of inducement to contract for more than twelve per cent. per annum, whether made in advance or not, shall be deemed and taken to be *payments made on* account of the *principal*, and the courts shall render judgment for no greater sum than the balance found due after deducting the payments of money or property made as aforesaid, *without interest*; nor shall any debtor be deemed in equal wrong on account of having paid, or having agreed to pay, such usurious interest or such inducement, but shall have like remedy and relief in either case.

"Sec. 4. Any person contracting, by promissory note, bill of exchange, bond, or otherwise, to receive a greater rate of interest than that allowed by this act, shall forfeit all interest, and shall recover no more than the principal of such note, bill, bond, or other contract."



These sections clearly limited the rate of interest to twelve per cent. per annum, and punished the creditor who contracted for more with an entire forfeiture of all interest, at the same time rewarding the debtor with a credit upon the principal debt of so much as he might have paid for interest on a usurious contract. This remained the law until June 20, 1872, when sections two, three, and four quoted were repealed by the Act of February 28, and the following took effect : —

Laws 1872, p. 284. "Sec. 2. The parties to any bond, bill, promissory note, or other instrument of writing for the payment or forbearance of money, may stipulate therein for interest receivable on the amount of such bond, bill, note, or other instrument of writing; *provided*, that no person shall recover in any court more than twelve per cent. interest thereon per annum.

"Sec. 3. All payments of money or property made by way of usurious interest or inducement to contract for more than twelve per cent. per annum, whether made in advance or not, shall be deemed and taken to be payments made on account of the principal *and* twelve per cent. interest per annum, and the courts shall render judgment for no greater sum than the balance found due after deducting the payments of money or property made as aforesaid."

A general denial was filed to the petition, a jury waived, and the cause tried by the court.

*McComas & McKeighan*, for the plaintiff.

*John K. Cravens*, *contra*.

DILLON, C. J. The usurious transaction in respect of which this action is brought occurred after the state statute of June 20, 1872 (Laws of 1872, p. 284), went into operation. This statute, as construed by the supreme court of the state, "allowed parties to contract for any rate of interest they might choose, but did not allow the creditor to recover for more than the principal *and* interest at the rate of 12 per cent. per annum." *Jenness v. Cutler*, 12 Kansas, 511, per Valentine, J.

On the loans to the bankrupts, the defendant bank contracted for and received interest at the rate of eighteen per cent. per annum. If the debtors had not been adjudged bankrupt, could they have recovered under section 30 of the National Banking Act? Rev. Stats. secs. 5197, 5198. If so, does this right of action pass to their assignee in bankruptcy? And if so, what is the extent of the recovery? These are the questions in the case.

1. If the effect of the state statute of June 20, 1872, was to abrogate all rates of interest; if after that enactment no rate of interest exists or "no rate is fixed by the laws of the State" of Kansas, then national banks would be restricted to seven per cent. as the maximum rate they could lawfully charge. Rev. Stats. sec. 5197; *Tiffany v. National Bank of Missouri*, 18 Wall. 408 [1 Am. L. T. R. N. S. 158].

If, however, this was not the effect on that enactment, then twelve per cent. is the maximum legal rate allowed by the laws of Kansas. In either event, the defendant bank charged and received an illegal rate. If bankruptcy had not supervened, it is clear that Marsh & Overhuls, the bankrupts, might, under the National Banking Act (Rev. Stats. sec. 5198), have recovered from the defendant bank twice the amount of interest paid, as therein provided.

Indeed, the right of action is yet *in them* if it is not barred by the two years limitation (Rev. Stats. sec. 5198), unless it has passed to their assignee in bankruptcy.

2. The next question is, *Is* the assignee in bankruptcy their "legal representative" within the meaning of the statute? Rev. Stats. sec. 5198. It is our opinion that an assignee in bankruptcy is, in respect of such a claim as this, which has injuriously affected and reduced the estate in bankruptcy, and which is to be enforced "by an action in the nature of an action of debt," peculiarly and most appropriately "the legal representative" of the bankrupt. Every reason which in case of the death of the debtor, without bankruptcy, would give the right of action to the administrator or executor, as his legal representative, applies with full force to the assignee in bankruptcy, if his estate is, during his lifetime, administered in a court of bankruptcy. See *Tiffany v. Nat. Bank of Mo. supra*; 1 Deacon on Bankruptcy (3d ed.), 523, 524; *Beckham v. Drake*, 2 H. L. Cases, 640.

In this view it is unnecessary to determine whether the right of action would vest in the assignee under the bankrupt act (Rev. Stats. secs. 5044, 5045, 5046, 5047), though it seems not improbable that the provisions of these sections are comprehensive enough to embrace it. *Darby's Trustees v. Boatmen's Sav. Inst.* 1 Dillon, 141; *S. C.* 18 Wall. 375.

Under the English bankrupt act no right of action passes to the assignee for a mere personal tort to the bankrupt, as for assault or libel, but it is otherwise in respect of injuries or torts which result in diminishing the estate of the bankrupt; and the distinction is taken between rights of action where personal suffering or inconvenience is the primary cause of the action (which do not pass), and where pecuniary loss or damage is the primary cause of action, which do pass. 1 Deacon on Bankruptcy (3d ed.), 522 *et seq.* This distinction seems to be made in our bankrupt act, which vests in the assignee all such "rights of action."

3. The next question is, whether the recovery shall be for double the whole amount of interest paid, or only double the amount in *excess* of the legal rate, whether that be seven or twelve per cent.? Where an illegal rate of interest is charged, and an action is brought on the contract, the statute declares a "forfeiture of the *entire* interest," and if the usurious interest has been paid, the statute gives an action to recover back, not simply the excess over the legal rate, but "twice the amount of interest thus paid," that is, paid in pursuance of an usurious contract or transaction.

National banks owe a duty to the public to observe the limitations of the act of Congress in respect of the rate of interest; limitations wisely imposed, but in many of the Western States at least, very frequently disregarded. They have privileges enough, without usurping others. They have powers enough, without exercising those not conferred, or transcending the limits of their charters. They ought not to become usurers; and if they do, public policy is promoted by an enforcement of the penalties which the statute has denounced. It should be borne in mind that the statute confirms the action to the person who has paid the illegal interest, or to his legal representative, thus showing that it was in part its purpose to repair thus loss or reimburse his estate — there being superadded, the further

purpose of preventing such violations of the law, the infliction of a penalty of twice the amount of interest paid. This penalty was, doubtless, supposed by Congress to be no more than would be reasonably sufficient to cover the excess of interest over the legal rate, and costs and expenses of litigation, and at the same time make it more profitable to the banks to obey the law than to violate it.

Judgment will be entered for the plaintiff for \$2,219.92, that being twice the full amount of interest paid on the usurious transactions set out in the petition, not barred.

*Judgment accordingly.*

## SUPREME COURT COMMISSION OF OHIO.

(To appear in 27 Ohio St.)

### INSURANCE. — ASSIGNMENT INTER SESE OF POLICY ISSUED TO PARTNERS.

#### WEST v. CITIZENS' INSURANCE CO.

Policies of insurance, like other contracts, are to receive a reasonable construction, so as not to defeat the intention of the parties.

A policy of insurance issued to a mercantile partnership on a stock of goods owned by the firm, and with which they are carrying on business, which contains no provisions limiting or restricting alienation of the property, is not avoided by a sale by one partner to his copartners, who continue the partnership business, of his interest in the stock of goods.

When the policy contains a provision that the assignment of the same, or any interest therein, without the assent of the company indorsed thereon, avoids it, such a sale, and the assignment by the retiring partner to his copartners, who continue the business, of his interest in the policy does not avoid it.

In case of loss after such sale and transfer, the remaining partners, being the real parties in interest, should sue on the policy, and in such action they are not limited in the amount of recovery to their interest in the partnership goods before such sale and transfer, but can recover for the whole loss.

THE action was upon a policy of insurance on a stock of queensware against loss by fire, originally issued to the firm of H. F. West & Co. (composed of the plaintiffs and Henry F. West), on April 17, 1866, and in force by renewals, as the plaintiffs claim, on the 17th day of January, 1870, when a loss to the amount of \$9,701.19 was suffered by them by the destruction by fire of the insured property, of which loss the proportion properly chargeable to the defendant was \$2,425.80, to recover which this action was brought.

The petition states that on December 1, 1869, "said Henry F. West retired from said firm, and assigned all his interest in said policy and in said stock of goods to his copartners, the plaintiffs, who have ever since held and owned the same."

The policy contains the following provision, which the court of common pleas held was violated by the said retirement of Henry F. West

from the firm of H. F. West & Co., and his transfer of interest to his copartners: "And it is further agreed, that . . . if this policy, or any interest therein, shall be assigned, unless . . . the assent thereto of said company be obtained and indorsed hereon, these presents shall henceforth be null and void."

*Hoadley, Johnson & Colston*, of Cincinnati, for plaintiffs in error. The only question in this case is, whether a prohibition contained in a policy of insurance issued to partners, against the assignment of "any interest therein," refers to transfers *inter sese*.

Three theories might be, and have been, espoused: first, that if one partner retire from a firm, all its policies of insurance containing the quoted clause, or a similar provision forbidding alienation of the insured premises, are at once forfeited, and unless by consent of the underwriter cease and determine; secondly, that such alienation has the effect of forfeiture only to the extent of the retiring partner's undivided interest; and thirdly, that the purpose of such provision is not to forbid changes of interest among the partners themselves, but relates exclusively to assignments and alienations to third persons.

Can it be possible that the assignment by one of these partners to one of his copartners, of one half his nominal interest, reducing it, say, from one third to one sixth, or from one tenth to one twentieth, leaving him liable for all the debts of the firm, would have the effect to forfeit the partnership policies, while the overdraw of his account, which would make him actually a debtor to the firm, would not?

But how can it be contended that a change in the relative interests of the partners by the sale of part of the interest of one to another is not forbidden by the quoted clause, if it apply to the transfer of the entire interest of a retiring partner? It is equally within the letter of the prohibition. If one be the assignment of an "interest" in the policy or the property, so also is the other.

Nor can it be the purpose of this clause to retain for the underwriter the protection of the care and attention of all the assured. 32 New York, 411; *Perrin v. Protection Ins. Co.* 11 Ohio, 147.

Under the common law rules of pleading an alienation of his interest in the policy by one, might prevent him from suing, and thus prevent the others, unless in equity or in the name of all for their use. And such is the explanation of the case of *Murdock v. Chenango Co. Ins. Co.*, which gave rise to most of the fallacies that, for a long time, obscured this subject. But if all are insured, then all must alienate to forfeit the policy. The firm being insured, how can an alienation other than by the firm forfeit? "It is the act of the party insured, in violation of the conditions and stipulations contained in the policy, which alone can avoid the contract." *Foster et al. v. Equitable Mutual Fire Ins. Co.* 2 Gray, 216, 220; *Lawrence v. Holyoke Ins. Co.* 11 Allen, 387.

It follows from this, that an alienation other than by the "insured" does not avoid a policy. Hence we may conclude that if a firm be insured, the alienation by a partner of his individual interest, especially to his copartners, is not forbidden; but on the contrary, that the real purpose and intent of the parties in agreeing to the language used in the policy is to prevent alienations to third persons by the firm, which shall in-

introduce strangers into the proprietary interest and control, unless by consent of the company. Page 412 of 32 New York.

Again, it is a well settled principle of the law of insurance that a policy is to be most strongly construed against the underwriter. May on Insurance, §§ 174, 175.

This policy does not specify by whom the alienation is forbidden, or to whom it is prohibited to be made. Thus there is left a question for construction. It must be by a party to the policy. But the party assured is the firm. Therefore the forbidden alienation must be that of the firm. H. F. West individually had no legal interest in the policy; he was only interested therein in his partnership character—individually he could only act as agent of the firm. And considering also the constant changes in interest among the partners which every mercantile partnership involves, the just construction would seem to be that to forfeit the policy the alienation must be by the firm, and to a stranger, not to a partner. *Burnett & Martin v. Eufaula Home Ins. Co.* 46 Ala. 11; *Pierce v. Nashua Fire Ins. Co.* 50 New Hamp. 297.

This policy does not contain any condition forbidding the alienation of the premises or property insured. As to that, the underwriter seems to have relied on the common law rule requiring insurable interest at the time of the policy and of the loss. Why, then, did the underwriter provide against an assignment of the policy? Because it suited his views of his advantage to stipulate that the policy should be kept in the control of those having the insurable interest. Having omitted to forbid transfers of the property among themselves, he will not be presumed to have intended to forbid like transfers of the policy, which was taken out to protect the property.

This view of the policy is also sustained by the principle that "conditions providing for disabilities and forfeitures are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced." *Hoffman v. Aetna Ins. Co.* 32 N. Y. 414, and cases cited.

*Matthews, Ramsey & Matthews*, for defendant in error. Citing in support, May on Ins. § 280; *Flanders on Fire Ins.* 428; *Howard & Ryckman v. Albany Ins. Co.* 3 Denio, 301; *Murdock et al. v. Chenango Mut. Ins. Co.* 2 Comst. 210; *Tillou v. Kingston Mut. Ins. Co.* 5 N. Y. 405; *Hobbs & Hurley v. Memphis Ins. Co.* 1 Sneed, 444; *Tate v. Citizens' Mut. F. Ins. Co.* 13 Gray, 79; *Wood v. Rutland & Addison Mut. F. Ins. Co.* 31 Vt. 552; *Barnes v. Union Mut. Ins. Co.* 51 Me. 110; *Hoxie v. Providence Mut. F. Ins. Co.* 6 R. I. 517; *Finley et al. v. Lycoming Mut. Ins. Co.* 30 Penn. St. 318; *Buckley v. Garrett*, 11 Wright, 47 Penn. St. 280; *Baltimore F. Ins. Co. v. McGowan*, 16 Md. 47; *Dix et al. v. Mercantile Ins. Co.* 22 Ill. 277; *Keeler v. Niagara F. Ins. Co.* 16 Wis. 523; *Hartford F. Ins. Co. v. Ross et al.* 23 Ind. 181; *Doher & Bumb v. Aetna Ins. Co.* 18 Mo. 128.

This array of authority in opposition to the latest decision in New York, proceeding as it does from the highest courts of so many states, is sufficient, so far as its weight is concerned, to determine the question. And we feel confident that a candid criticism of the grounds on which the opposing opinions have been rested will show that the weight of reason coincides with that of authority in favor of the proposition for which we

contend. It springs, indeed, from the very nature of the contract of insurance, which is not an obligation inhering in the property insured, and passing with it, like a covenant of title annexed to an estate in lands, but a contract of personal indemnity, intended only to make good any pecuniary loss which may happen during the period of the risk, from any peril covered by the undertaking, to the very party or parties with whom the contract is made. Hence it is an axiom in the law of insurance that the party insured must have an insurable interest at the time of the inception of the contract, and also at the time of the loss; for otherwise he can suffer no loss. And it follows, quite as evidently, that the contract, in its origin, being jointly with two, does not subsist if at the time of the loss either party has severed, by his own act, his interest in it. The engagement is *in solido*, to pay to them jointly, and not otherwise, a joint loss, and not one several to each or either. And this is not a technical view; because it can never be properly shown that it was not essential to the consent of the insurer, in entering into the contract, that he had the stipulations of both and all the parties with whom he has contracted. It would be as reasonable to permit a recovery in case of complete alienations to total strangers as in the present case — a doctrine, of course, for which no one does or can contend. The opposite doctrine is as inconsistent with the theory and principle of insurance contracts as in its practical application it would be found hurtful and injurious to the business of insurance, and is in express contradiction to the language of the contract, which avoids the policy if any interest in it shall be assigned without the written consent of the company.

We respectfully submit that there is no error in the judgment of the court below, and that it should be affirmed.

JOHNSON, J. The question in this case arises on a demurrer of the defendant to the petition, alleging that said petition did not state facts sufficient to constitute a cause of action.

The plaintiffs sue as individuals, and not in the partnership name, and claim to recover on a policy of insurance against fire, on a stock of goods in Indianapolis, for one year from April 17, 1869, to April 17, 1870. The original policy was issued April 17, 1866, for one year, and was renewed each year thereafter, the last renewal being on April 17, 1869. It was issued to the firm of H. F. West & Co., composed of the plaintiffs and one Henry F. West, who on the 1st of December, 1869, retired from the firm, and assigned all his interest in said policy and stock of goods to his copartners the plaintiffs, who continued the business. The stock of goods was consumed by fire December 17, 1869. Hence this action.

By the terms of the policy the defendant contracted "to make good to the insured, their executors, administrators, or assigns, all such immediate loss or damage as shall happen by fire to the said company."

Upon the foregoing facts but one question is presented: that is, Did the assignment by Henry F. West, of his interest in the policy and stock of goods, avoid the policy? In form and language it is an agreement between two parties, the insurer and the insured, though executed only by the insurer.

The only clause relating to such a transfer is in the words following: "And it is further agreed . . . that if this policy, or any interest

therein, shall be assigned, unless in either case the assent thereto of said company be indorsed hereon, these presents shall thenceforth be null and void."

It will be observed that this policy (which is part of the record) is a contract with a partnership, and not with the individuals composing it; that as such partners they owned the stock of goods, and were doing business therewith in the usual way.

It is also important to note that the policy contains no provisions relating to alienation of the property, or prescribing any mode of continuing the policy in case of sale of the goods, by obtaining the assent of the company thereto. Such provisions are to be found, we believe, in most insurance contracts.

The clause above quoted relates only to an assignment of the policy or any interest therein, and is silent as to the alienation of the property insured. Ordinarily this omission is unimportant, for it is well settled that in such case, when the insured by alienation or otherwise parts with all his insurable interest in the property insured, he cannot in case of loss recover, because having no interest in the property destroyed he has sustained no damage. Neither can the assignee of the policy without the assent of the assurer recover, because he is a stranger to the contract whom the company is not bound to recognize. In the examination of the numerous cases cited, this omission is an important element, as very many of them turn on the words limiting and restraining alienation. Thus in *Dix v. Mercantile Ins. Co.* 22 Ill. 277; and *Hartford Ins. Co. v. Ross et al.* 23 Ind. 179, there was this clause, upon which the cases largely turned: "And in case of any transfer or change of title in the property, or of any undivided interest therein, such insurance shall be void and cease." They were cases much like the one before us, and stress is laid by the court on the words "undivided interest," as correctly describing a partner's interest. So also in many other cases the peculiar wording of these clauses relating to alienation enter largely into the discussion of the legal aspects of the case in the opinion of the courts deciding them.

As to such clauses it is sufficient to say, that as a general rule their only effect is to either enlarge or restrict the right, which exists without them, to bring an action by the assured in case of loss. If the assured still retained such an insurable interest in the property as that he sustains a loss by the fire, he can, to the extent of that loss, recover; otherwise if he has parted with all such interest, for then no damage has resulted to him.

Great care should also be taken to distinguish between those cases decided by an application of the common law rules of pleading, and those which are made to depend solely on the rights of the parties growing out of the terms of the contract itself. The former depend on who are the proper parties to the action at common law; the latter on the terms of the contract, and from these terms the court must determine the existence, extent, and character of the obligations and liabilities of the parties to the contract. The one is to be decided by the rules of pleading; the other by a construction of the stipulations of the policy.

Since the adoption of our Code, under which the real party in interest

may sue, whether the contract is joint or several, the former class of decisions becomes unimportant. There can be no doubt, that if the common law rules of pleading were in force in Ohio, the plaintiffs could not recover. Not because they had no insurable interest, for they owned all the property covered by the policy; nor because they sustained no damage, for that is admitted; but solely for the reason that this was a joint contract by the insured, and all must be joined as plaintiffs. By these rules, if all were so joined they still could not recover, because Henry F. West, one of the joint contractors, had parted with all his insurable interest by sale. In either case the result would alike be fatal to these plaintiffs, who have sustained all the loss against which they were indemnified; and the rights of the parties and the liabilities of the insurers arising from the terms of the policy would remain undetermined by the court.

In *Murdock v. Chenango Ins. Co.* 2 Comst. 210, one tenant in common sold his interest in the property insured to his co-tenant. The action was in the name of both, though the company had assented to the sale. It was held that the misjoinder was fatal. On the other hand, *Tate v. Citizens' Ins. Co.* 13 Gray, 79, was a case like the former, except that the action was in the name of the co-tenant who had become sole owner by purchase. It was held that the nonjoinder was alike fatal; Judge Bigelow saying: "Upon familiar principles both the joint contractors should join in bringing the action, . . . and the omission to join them is a good defence."

In both cases the parties were sent out of court without their rights adjudicated, by the application of the "familiar principles" of common law pleading. Under the Code the real party in interest must sue. In this case the suit is properly brought, but the right of recovery does not depend on questions of misjoinder or nonjoinder of parties, but upon the liability of the insurers growing out of the contract.

Is the defendant therefore liable to the plaintiffs, by the terms of this policy? To determine this question reference must be had to the familiar rules of construction. The policy should receive a reasonable interpretation; its intent and substance should be ascertained from the language employed; its stipulations should have full legal effect to guard the insurer against fraud and imposture. As it is a contract of indemnity to the insured, it should be literally construed in his favor, not only because this mode of construction is most conducive to trade and business, but because it is probably most consonant with the intentions of the parties. There is no more reason for a strict compliance with its terms than ordinary contracts. There is nothing in such a contract intrinsically more sacred or inviolable than a contract about any other subject. 25 Wend. 374. Exceptions in a policy should be strictly construed, and when there are two interpretations equally fair, that which gives the greater indemnity should prevail. May on Insurance, § 174. None of these rules is more fully established, or more imperative and controlling, than that which declares that it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to indemnity, which in making his insurance it was his object to secure; and when the words without violence are susceptible of two interpretations, that which will sustain the claim and



cover the loss must in preference be adopted. May on Insurance, § 175. Guided by these principles let us examine the terms which it is claimed avoid this policy.

The natural reading of these terms, "if this policy or any interest therein be assigned," would seem to be completed by adding after the word "assigned," the name of the contracting party, so as to read, "if this policy or any interest therein be assigned by said H. F. West & Co." H. F. West & Co. alone could make an assignment of the title to the policy. Henry F. West did not assign the policy, or any interest in it which the firm had. The partnership name must be used to transfer the policy, or any definite interest therein.

The cases are numerous where it has been held that to constitute alienation of the property a conveyance of the title, and nothing short of this, would amount to an alienation; that "transfer of the title to property insured," means the title and ownership of property insured, and not the interest of the insured therein. *Masters v. Madison County Ins. Co.* 11 Barb. 624. A sale by one partner to another is not such an alienation as will avoid the policy, even under the express condition that the policy shall become void. Angell on Ins. 197.

A mere change of interests or ownership among partners, when no stranger is introduced, and no addition made to the number of the insured, where there is no change in the condition or situation of the property or risk, a mere assignment of his interest by one partner to the other is obviously not within the principle or motives on which the condition is founded. *Pierce v. Nashua Fire Ins. Co.* 50 N. H. 297.

Henry F. West assigned his interest in the policy. What was that interest? Not any aliquot part of the whole, for they were partners, seized *per my et per tout* of the common stock of goods. *West v. Ship*, 1 Vesey Sen. 242. It was his share of the capital stock remaining after satisfying all partnership demands. When title to property real or personal is in a partnership, and is owned by it, it is clear that the conveyance by one partner of his interest conveys no greater interest than remains after all the demands against the firm are satisfied. If this firm had been insolvent when the policy was assigned, so that, counting the insurance money as part of its assets, it could not pay its debts, then nothing was in fact assigned. For aught the court knows, this may have been so in this case.

The contracting parties were the insurers on the one hand, and H. F. West & Co. on the other. The language is clearly susceptible of the construction we have given. The one claimed by the defendant seems strained and unnatural, and calculated to defeat rather than carry out the intention of the parties. It does violence to all settled rules of construing contracts.

Conditions of this kind should not be extended, by construction, beyond the reasons for their adoption, especially when, as in this case, it defeats the contract. The chief reason for requiring such a stipulation is to guard against the introduction of a stranger, who may not possess the fidelity or watchfulness required by the insurers. The change should increase the hazard. In case of a clause of this kind it was held that a sale or conveyance to the assured does not defeat the policy, though

within the words of the proviso against a sale or transfer. The interest of the insured being thereby increased, the case did not fall within the reason and spirit of the proviso. May on Insurance, § 275, and cases cited.

To say that H. F. West & Co. shall not assign the policy, or any interest therein, without consent, is a reasonable condition; but to say that the partners *inter sese* may not change their respective interests, is not within the spirit and reason of the clause. The presumption is that the company had faith in all the partners. The increase of plaintiff's interests, as we have seen, would but make them more watchful; the retiring partner no longer had a motive to endanger the insurer; no stranger was introduced; no one but those with whom the contract was made was left in control.

There being no adequate reason to support this enlarged construction we cannot adopt it.

It is suggested that this clause was intended to secure the continuance of Henry F. West, in whom the company reposed special confidence, and without him the policy would not have been issued. In reply to this we adopt the language of the New York court of appeals in *Hoffman v. Aetna Ins. Co.* 32 N. Y. 411, in a similar case.

"They testified their confidence in each of the assured by issuing to them a policy, but did not choose to repose a blind confidence in others who might succeed to the ownership. The only evidence of their confidence in either partner, is in the fact that they contracted with all; and the theory is rather fanciful than sound, that they may have intended to conclude a bargain with rogues on the faith of a proviso that one honest man should be left in the firm to watch them."

"It was intended by the proviso to protect the company from a continuing obligation to the assured. If the title and beneficial interest should pass to others they might not be equally willing to trust. Words should not be taken in their broadest import when they are equally appropriate in a sense limited to the object the parties had in view."

There is still another rule equally at variance with the defendant's claim.

Stipulations in a contract, providing for disabilities or forfeitures, are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced. To seize on words introduced into the policy as a safeguard, and make them available to defeat the claim of the assured on the theory of a technical forfeiture, is in no possible view permissible. If the policy admits of such a construction, it is due to the dexterity of the draughtsman, and not to a meeting of the minds of the parties. 32 N. Y. 414.

We conclude, therefore, that the clause under consideration in common with the facts disclosed does not avoid the policy, and that the plaintiffs are entitled to recover therein.

Finally: The question arises, shall these plaintiffs recover the whole that H. F. West & Co. might have recovered, or only their individual shares? Does the sale by Henry F. West avoid the policy as to his individual interest?

In *Hobbs & Hurley v. Memphis Ins. Co.* 1 Sneed, 444, a case much like this as to its facts, it was held as to the share or interest of the retiring

partner, the plaintiffs could not recover but only for their own interest in the firm; while in *Hoffman v. Aetna Ins. Co.* 32 N. Y. 415, where the same question arose, it was decided otherwise. The court there say: "There is no reason why the full measure of indemnity should be withheld from the plaintiffs who were owners at the date of the insurance, and sole owners at the time of the loss."

. We concur in the reasoning of the court in that case, and its conclusions of law on this point.

These plaintiffs were parties to the contract; they continued to conduct the business contemplated by the policy. There was no substantial change material to the risk, and none within the meaning of the clause under consideration. The policy was intended to protect the interest of each and all, and its language fairly construed is in harmony with that intent.

We are aware that the conclusions we have reached are at variance with the greater number of reported cases; but we believe these conclusions rest on the firmer and more satisfactory ground of sound principles, and that they are more conducive to substantial justice — the aim and end of all law.

*Judgment reversed and cause remanded for further proceedings.*

SCOTT, C. J., DAY, WHITMAN, and WRIGHT, JJ. concurred.

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## SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1875.]

REMOVAL OF CAUSES. — POWERS OF CONGRESS. — CONSTRUCTION OF ACT OF MARCH 2, 1867. — SUIT TO ANNUL WILL MAY BE REMOVED.

### GAINES v. FUENTES.

In cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different states, it rests with Congress to determine at what time the power may be invoked, and upon what conditions; whether originally in the federal court, or after suit brought in the state court; and in the latter case, at what stage of the proceedings; whether before issue or trial by removal to a federal court, or after judgment upon appeal or writ of error.

As the Constitution imposes no limitation upon the class of cases involving controversies between citizens of different states, to which the judicial power of the United States may be extended, Congress may provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary.

The Act of Congress of March 2, 1867, in authorizing and requiring the removal to the circuit court of the United States of a suit pending or afterwards brought in any state court involving a controversy between a citizen of the state where the suit is brought and a citizen of another state, thereby invests the circuit court with jurisdiction to pass upon and determine the controversy, when the removal is made, though that court could not have taken original cognizance of the case.

A suit to annul a will as a muniment of title, and to restrain the enforcement of a decree

admitting it to probate, is in essential particulars a suit in equity; and if by the law obtaining in a state, customary or statutory, such a suit can be maintained in one of its courts, whatever designation that court may bear, it may be maintained by original process in the circuit court of the United States, if the parties are citizens of different states.

Mr. Justice FIELD delivered the opinion of the court.

This is an action in form to annul an alleged will of Daniel Clark, the father of the appellant, dated on the 13th of July, 1813, and to recall the decree of the court by which it was probated. It was brought in the second district court for the parish of Orleans, which, under the laws of Louisiana, is invested with jurisdiction over the estates of deceased persons, and of appointments necessary in the course of their administration.

The petition sets forth that on the 18th of January, 1855, the appellant applied to that court for the probate of the alleged will; and that by decree of the supreme court of the state the alleged will was recognized as the last will and testament of the said Daniel Clark, and was ordered to be recorded and executed as such; that this decree of probate was obtained *ex parte*, and by its terms authorized any person at any time, who might desire to do so, to contest the will and its probate in a direct action, or as a means of defence by way of answer or exception, whenever the will should be set up as a muniment of title; that the appellant subsequently commenced several suits against the petitioners in the circuit court of the United States to recover sundry tracts of land and properties of great value, situated in the parish of Orleans and elsewhere, in which they are interested, setting up the alleged will as probated as a muniment of title, and claiming under the same as instituted heir of the testator; and that the petitioners are unable to contest the validity of the alleged will so long as the decree of probate remains unrecalled. The petitioners then proceed to set forth the grounds upon which they ask for a revocation of the will and the recalling of the decree of probate, these being substantially the falsity and insufficiency of the testimony upon which the will was admitted to probate, and the status of the appellant, incapacitating her to inherit or take by last will from the decedent.

A citation having been issued upon the petition and served upon the appellant, she applied in proper form, with a tender of the necessary bond, for removal of the cause to the circuit court of the United States for the district of Louisiana, under the twelfth section of the Judiciary Act of 1789, on the ground that she was a citizen of New York, and the petitioners were citizens of Louisiana. The court denied the application, for the alleged reason that, as the appellant had made herself a party to the proceedings in the court relative to the settlement of Clark's succession by appearing for the probate of the will, she could not now avoid the jurisdiction when the attempt was made to set aside and annul the order of probate which she had obtained. The court, however, went on to say in its opinion that the federal court could not take jurisdiction of a controversy having for its object the annulment of a decree probating a will.

The appellant then applied for a removal of the action under the Act of March 2, 1867, on the ground that from prejudice and local influence she

would not be able to obtain justice in the state court, accompanying the application with the affidavit and bond required by the statute. This application was also denied, the court resting its decision on the alleged ground, that the federal tribunal could not take jurisdiction of the subject matter of the controversy.

Other parties having intervened, the applications were renewed and again denied. An answer was then filed by the appellant, denying generally the allegations of the petition, except as to the probate of the will, and interposing a plea of prescription. Subsequently a further plea was filed to the effect that the several matters alleged as to the status of the appellant had been the subject of judicial inquiry in the federal courts, and been there adjudged in her favor. Upon the hearing a decree was entered annulling the will and revoking its probate. The supreme court having affirmed this decree, the case was appealed to this court.

In the view we take of the application of the appellant to remove the cause to the federal court, no other question than the one raised upon that application is open for our consideration. If the application should have been granted, the subsequent proceedings were without validity, and no useful purpose would be obtained by an examination of the merits of the defence, upon the supposition that the state court rightfully retained its original jurisdiction.

The action, as already stated, is in form to annul the alleged will of Daniel Clark, of 1813, and to recall the decree by which it was probated. But as the petitioners are not heirs of Clark, nor legatees, nor next of kin, and do not ask to be substituted in place of the appellant, the action cannot be treated as properly instituted for the revocation of the probate, but must be treated as brought by strangers to the estate against the devisee to annul the will as a muniment of title, and to restrain the enforcement of the decree by which its validity was established, so far as it affects their property. It is in fact an action between parties; and the question for determination is, whether federal courts can take jurisdiction of an action brought for the object mentioned between citizens of different states, upon its removal from a state court. The Constitution declares that the judicial power of the United States shall extend to "controversies between citizens of different states," as well as to cases arising under the Constitution, treaties, and laws of the United States; but the conditions upon which the power shall be exercised, except so far as the original or appellate character of the jurisdiction is designated in the Constitution, are matters of legislative direction. Some cases there are, it is true, in which, from their nature, the judicial power of the United States, when invoked, is exclusive of all state authority. Such are cases in which the United States are parties, cases of admiralty and maritime jurisdiction, and cases for the enforcement of rights of inventors and authors under the laws of Congress. *The Moses Taylor*, 4 Wallace, 429; *Railway Co. v. Whitton*, 13 Ib. 288. But in cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different states, it rests entirely with Congress to determine at what time the power may be invoked and upon what conditions; whether originally in the federal court, or after suit brought in the state court; and in the latter case, at what stage of the proceedings; whether

before issue or trial by removal to a federal court, or after judgment upon appeal or writ of error. The Judiciary Act of 1789, in the distribution of jurisdiction to the federal courts, proceeded upon this theory. It declared that the circuit courts should have original cognizance, concurrent with the courts of the states, of all suits of a civil nature or in equity, involving a specified sum or value, where the suits were between citizens of the state in which they were brought and citizens of other states; and it provided that suits of that character by citizens of the state in which they were brought might be transferred, upon application of the defendants, made at the time of entering their appearance, if accompanied with sufficient security for subsequent proceedings in the federal court. The validity of this legislation is not open to serious question, and the provisions adopted have been recognized and followed, with scarcely an exception, by the federal and state courts since the establishment of the government. But the limitation of the original jurisdiction of the federal court, and of the right of removal from a state court, to a class of cases between citizens of different states involving a designated amount, and brought by or against resident citizens of the state, was only a matter of legislative discretion. The Constitution imposes no limitation upon the class of cases involving controversies between citizens of different states, to which the judicial power of the United States may be extended; and Congress may, therefore, lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary.

As we have had occasion to observe in previous cases, the provision of the Constitution, extending the judicial power of the United States to controversies between citizens of different states, had its existence in the impression that state attachments and state prejudices might affect injuriously the regular administration of justice in the state courts. It was originally supposed that adequate protection against such influences was secured to the plaintiff by an election of courts before suit, and when the suit was brought in a state court, a like election to the defendant afterwards. *Railway Co. v. Whitton*, 13 Wallace, 289. But the experience of parties immediately after the late war, which powerfully excited the people of different states, and in many instances engendered bitter enmities, satisfied Congress that further legislation was required fully to protect litigants against influences of that character. It therefore provided, by the Act of March 2, 1867, (14 Sts. at Large, 559), greater facilities for the removal of cases involving controversies between citizens of different states from a state court to a federal court, when it appeared that such influences existed. That act declared that where a suit was then pending, or should afterwards be brought in *any* state court, in which there was a controversy between a citizen of the state in which the suit was brought and a citizen of another state, and the matter in dispute exceeded the sum of five hundred dollars, exclusive of costs, such citizen of another state, whether plaintiff or defendant, upon making and filing in the state court an affidavit that he had reason to believe, and did believe, that from prejudice or local influence he would not be able to obtain justice in the state court, might at any time before final hearing or trial of the suit obtain a removal of the case into the circuit court of the United States, upon pe-

tition for that purpose and the production of sufficient security for subsequent proceedings in the federal court. This act covered every possible case involving controversies between citizens of the state where the suit was brought and citizens of other states, if the matter in suit, exclusive of costs, exceeded the sum of five hundred dollars. It mattered not whether the suit was brought in a state court of limited or general jurisdiction. The only test was, did it involve a controversy between citizens of the state and citizens of other states, and did the matter in dispute exceed a specified amount. And a controversy was involved in the sense of the statute whenever any property or claim of the parties, capable of pecuniary estimation, was the subject of the litigation, and was presented by the pleadings for judicial determination.

With these provisions in force, we are clearly of opinion that the state court of Louisiana erred in refusing to transfer the case to the circuit court of the United States upon the application of the appellant. If the federal court had, by no previous act, jurisdiction to pass upon and determine the controversy existing between the parties in the parish court of Orleans, it was invested with the necessary jurisdiction by this act itself, so soon as the case was transferred. In authorizing and requiring the transfer of cases involving particular controversies from a state court to a federal court, the statute thereby clothed the latter court with all the authority essential for the complete adjudication of the controversies, even though it should be admitted that that court could not have taken original cognizance of the cases. The language used in *Smith v. Rines*, cited from the 2d Sumner's Reports, in support of the position that such cases are only liable to removal from the state to the circuit court as might have been brought before the circuit court by original process, applied only to the law as it then stood. No case could then be transferred from a state court to a federal court on account of the citizenship of the parties, which could not originally have been brought in the circuit court.

But the admission supposed is not required in this case. The suit in the parish court is not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate. It is, in all essential particulars, a suit for equitable relief; to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony. There are no separate equity courts in Louisiana, and suits for special relief, of the nature here sought, are not there designated suits in equity. But they are none the less essentially such suits; and if by the law obtaining in the state, customary or statutory, they can be maintained in a state court, whatever designation that court may bear, we think they may be maintained by original process in a federal court, where the parties are on the one side citizens of Louisiana, and on the other citizens of other states.

Nor is there anything in the decisions of this court in the case of *Gaines v. New Orleans*, reported in the 6th of Wallace, or in the case of *Broderick's will*, reported in the 21st of Wallace, which militate against these views. In *Gaines v. New Orleans*, this court only held that the probate could not be collaterally attacked, and that until revoked it was

conclusive of the existence of the will and its contents. There is no intimation given that a direct action to annul the will and restrain a decree admitting it to probate might not be maintained in a federal as well as in a state court, if jurisdiction of the parties was once rightfully obtained.

In the case of *Broderick's will*, the doctrine is approved, which is established both in England and in this country, that by the general jurisdiction of courts of equity, independent of statutes, a bill will not lie to set aside a will or its probate; and whatever the cause of the establishment of this doctrine originally, there is ample reason for its maintenance in this country, from the full jurisdiction over the subject of wills vested in the probate courts and the revisory power over their adjudications in the appellate courts. But that such jurisdiction may be vested in the state courts of equity by statute is there recognized, and that when so vested the federal courts, sitting in the states where such statutes exist, will also entertain concurrent jurisdiction in a case between proper parties.

There are, it is true, in several decisions of this court, expressions of opinion that the *federal courts have no probate jurisdiction, referring particularly to the establishment of wills*, and such is undoubtedly the case under the existing legislation of Congress. The reason lies in the nature of the proceeding to probate a will as one *in rem*, which does not necessarily involve any controversy between parties; indeed, in the majority of instances no such controversy exists. In its initiation all persons are cited to appear, whether of the state where the will is offered or of other states. From its nature and from the want of parties, or the fact that all the world are parties, the proceeding is not within the designation at law or in equity between parties of different states, of which the federal courts have concurrent jurisdiction with the state courts under the judiciary act. But whenever a controversy in a suit between such parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.

But, as already observed, it is sufficient for the disposition of this case that the statute of 1867, in authorizing a transfer of the cause to the federal court, does, in our judgment, by that fact, invest that court with all needed jurisdiction to adjudicate finally and settle the controversy involved.

It follows from the views thus expressed that the judgment of the supreme court of Louisiana must be reversed, with directions to reverse the judgment of the parish court of Orleans, and to direct a transfer of the cause from that court to the circuit court of the United States, pursuant to the application of the appellant; and it is so ordered.

Mr. Justice BRADLEY, dissenting. The question whether the proceeding in this case, which was instituted in the state court of probate, was removable thence into the circuit court of the United States, depends upon the true construction of the acts of Congress which give the right of removal. The first law on this subject was the twelfth section of the Judiciary Act of 1789; which declares "that if a suit be commenced in any state court against an alien, or by a citizen of the state in which the



suit is brought against a citizen of another state" [and certain conditions and security specified in the act be performed and tendered], "it shall be the duty of the state court to . . . proceed no further in the cause, . . . which shall then proceed in the United States court 'in the same manner as if it had been brought there by original process.'" This 12th section cannot be entirely understood without reference to the preceding section, by which the original jurisdiction of the circuit courts have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state; . . . but that "no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

Now, the question arises, what proceedings are meant by the phrase, "suits of a civil nature at common law or in equity," in the latter section, conferring original jurisdiction, and the phrase "a suit," in the former section, giving the right of removal. A "suit of a civil nature at common law or in equity" may, by virtue of the 11th section, be brought in a circuit court, if the parties are citizens of different states, and one of them is a citizen of the state where the suit is brought. "A suit" commenced in any state court by a citizen of that state, against a citizen of another state, may be removed into the circuit court; and when removed, it is directed that "the cause shall then proceed in the same manner as if it had been brought there by original process." By this act, therefore, any "suit" which could have been originally brought in the circuit court may be removed there from the state court, if brought by a citizen of the state against a citizen of another state. And it was always supposed that if it could not be originally brought there, it could not be removed there; because it is to be proceeded in "as if it had been brought there by original process." Mr. Justice Story, in a case before him, decided in 1836, in reference to this section used the following language: "It is apparent from the language of the closing passage of the section above quoted, that it contemplates such cases, and such cases only, to be liable to removal, as might under the law, or at all events under the Constitution, have been brought before the circuit court by original process." Judge Conklin, in his Treatise on the United States Courts, a work long used with approbation by the profession, says: "It is obvious from the language of the twelfth section of the Judiciary Act, that it was not intended by it to extend the jurisdiction of these courts over causes brought before them on removal, beyond the limits prescribed to their original jurisdiction, and such, as far as it goes, is the judicial construction which has been given to this section." Congress, undoubtedly, might authorize, and in special cases has authorized, the removal of causes from state courts to the United States court, which could not have been originally brought in the latter. An instance of the kind is found in this very twelfth section, in a special case where a suit respecting the title to land has been commenced in a

state court between two citizens of the same state, and one of the parties, before the trial, states to the court by affidavit that he claims title under a grant from another state. In *Bushnell v. Kennedy*, 9 Wall. 387, however, this court held that a citizen of one state, sued in another state by a citizen thereof, on a claim which had belonged to a citizen of the latter state and had been assigned to the plaintiff, might have the cause removed to the circuit court of the United States, although, perhaps, it might not have been originally cognizable therein; but it still remains to determine what kinds of controversies are intended by the act.

Now, the phrase, "suits at common law and in equity," in this section, and the corresponding term, "suit," in the twelfth, are undoubtedly of very broad signification, and must be construed to embrace all litigations between party and party, which, in the English system of jurisprudence, under the light of which the Judiciary Act as well as the Constitution was framed, were embraced in all the various forms of procedure carried on in the ordinary law and equity courts—as distinguished from the ecclesiastical, admiralty, and military courts of the realm. The matters litigated in these extraordinary courts are not, by a fair construction of the Judiciary Act, embraced in the terms "suit at law or in equity," or "suit," unless they have become incorporated with the general mass of municipal law, and subjected to the cognizance of the ordinary courts.

Now, it is perfectly plain that an application for the probate of a will is not such a subject as is fairly embraced in these terms. This court has in repeated instances expressly said that the probate of wills and administration of estates does not belong to the jurisdiction of the federal courts under the grant of jurisdiction contained in the Judiciary Act. And it may, without qualification, be stated, that no respectable authority in the profession or on the bench has ever contended for any such jurisdiction. Whether, after a will is proposed for probate, and a *caveat* has been put in against it, and a *contestatio litis* has thus been raised, and a controversy instituted *inter partes*, Congress might not authorize the removal of the cause for trial to a federal court, where the parties *pro* and *con* are citizens of different states, is not now the question. The question before us is, whether Congress has ever done so. And it seems to me that it has not. The controversy is not of that sort of nature which belongs to the category of a suit at law or in equity, as those terms were used in the Judiciary Act.

It is not intended to say, that the validity of a will may not often come in question and require adjudication, in both a court of law and a court of equity. It does come in question frequently. *Devisavit vel non* is an issue frequently made at law and directed in equity; and there are special cases, also, where the validity of a will may be investigated in equity, as shown in the case of *Broderick's will*, lately decided by the court. But that is a very different thing from hearing and determining a question of probate, even when the question becomes a litigated one. This question belongs to special courts having a special mode of procedure, and is subject to rules that took their origin in the ecclesiastical laws. And it certainly cannot be seriously contended that, if the federal courts have no jurisdiction of the probate of wills, they nevertheless have jurisdiction of proceedings to revoke the probate. This would be to assume the whole jurisdiction of the subject

The proceeding in the case below was one to revoke the probate of a will—simply that and nothing more. It was not merely to set aside the will so far as it affected the complainants. Not at all. It brought up the question of probate under a form of proceeding peculiar to the course of justice in Louisiana, called an action of nullity. This action may, undoubtedly, be entertained in the federal courts in that state, at all events, to set aside their own judgments. But can it be entertained when the object is to revoke the probate of a will, by a decree to annul the judgment of probate? That is the precise question to be determined here.

It is contended, however, that the Act of March 2, 1867, which gives the right of removal to the federal court of a suit in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state, where the latter makes affidavit that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in the state court, extends the jurisdiction of the circuit court to cases of every kind of controversy which may be litigated between parties. But I cannot perceive any such intention in the act. There is no indication that the jurisdiction to the federal court was meant to be extended to any class of cases to which it did not extend before. It authorizes the removal at any time before trial, and gives the right to the plaintiff as well as the defendant. These are the only changes that seem to have been in the mind of Congress.

If it is desirable that the right of removal should be extended in cases like the present, it is easy for Congress to legislate to that effect. Until it does so, in my judgment the right does not exist. Perhaps it is desirable that the law should be as the appellant contends it is; but it is not for the court to make the law, but to declare what law has been made. I cannot free myself from the conviction that the decision of the court in this case is based rather upon what it is deemed the law should be, than upon a sound construction of the statutes which have been actually enacted.

In my opinion the judgment of the supreme court of Louisiana ought to be affirmed.

Mr. Justice SWAYNE concurred in the dissenting opinion.

Mr. Chief Justice WAITE dissented from the judgment of the court.

**CIRCUIT COURT OF THE UNITED STATES. — SOUTHERN  
DISTRICT OF ALABAMA.**

(To appear in 2 Woods' Reports.)

**LIFE INSURANCE. — PAYMENT OF PREMIUM NOTE A CONDITION PRECEDENT TO CONTINUANCE OF POLICY. — CUSTOM OF COMPANY, NOTICE, ETC.**

**THOMPSON v. THE KNICKERBOCKER LIFE INSURANCE COMPANY.**

1. The policy issued by a life insurance company provided that promissory notes payable during the year might be given by the assured for portions of the annual premium, and declared that in case such notes were not paid at maturity the policy should then and thereafter be void, without notice to any party or parties interested therein, and the notes also contained the same stipulation. *Held*, that the payment at maturity of the notes given for the premium was a condition precedent to the continuance of the policy, and on a failure to pay the notes the policy became void.
2. Where it was the custom of a life insurance company to give notice to the assured that the premium or premium note was about falling due, a neglect on the part of the company to give such notice will not save the policy from forfeiture, if the assured fails to pay the premium or premium note when due, unless the failure to give notice was fraudulent, and for the purpose of throwing the assured off his guard.
3. Where a policy of life insurance, and a premium note contained the stipulations set out in the first head-note, and the premium note was not paid at maturity: *Held*, that the insurance company was not bound to elect whether or not the policy should be forfeited, or to give any notice of such election.
4. Where it was the custom of a life insurance company not to exact punctual payment of its premium notes, but to allow thirty days' grace thereon, the company is not bound to pay the insurance money if the assured dies within the thirty days without having paid the premium note.

**ACTION AT LAW: heard on demurrer to replications.**

The suit was brought up on a policy of insurance, dated June 24, 1870, whereby the Knickerbocker Life Insurance Company, in consideration of the sum of \$410 paid in hand by Ruth E. Thompson, and a like sum to be paid by her on, or before, the 24th of January, in every year, during the continuance of the policy, did insure the life of John Y. Thompson, in the sum of \$5,000 for the benefit of said Ruth E. Thompson, his wife.

The complaint averred the death of John Y. Thompson, on November 3, 1874, while the policy was in force, that proof of death had been made to the company, and that all the terms and conditions of the policy had been complied with, and prayed judgment for the insurance money and interest.

To this complaint the defendant, besides the general issue, pleaded two special pleas, which, however, set up in effect the same defence.

The defence was in substance as follows: That the payment of the premium of four hundred and ten dollars on, or before, the 24th of January of each year, during the life of John Y. Thompson, was a condition precedent to the continuance of the policy. That by the terms of the policy an annual credit of a portion of the premium was provided for, and the policy contained a condition that the omission to pay the annual premium on or before noon of the 24th day of January of each year, or the

failure to pay at maturity any note, obligation, or indebtedness for premium or interest due under said policy, should then and thereafter cause said policy to be void without notice to any party or parties interested therein. That the annual premium was not paid on or before January 24, 1874, and the defendant thereupon gave said Thompson time for the payment of the premium upon the condition named in the note to be hereafter mentioned, and took certain promissory notes of said Thompson for the instalments of the premium, one of which was as follows:—

"\$109.

New York, Jan. 24, 1874.

"Nine months after date, without grace, I promise to pay the Knickerbocker Life Insurance Company, one hundred and nine dollars, at Mobile, Alabama, value received, in premium on policy No. 2834, which policy is to be void, in case this note is not paid at maturity, according to contract in the said policy:" that the terms and conditions of said note formed a part of the contract for the extension of the time given for the payment of said annual premium, that the note was not paid at maturity, nor in the lifetime of John Y. Thompson, nor has it been paid since; and that said policy became null and void from and after the 24th day of October, 1874, when said note fell due, and that said John Y. Thompson died after said date, and the amount of said note has never been paid to the defendant.

The plaintiff as authorized by sec. 2564 of the Revised Code of Alabama, filed four replications to these pleas.

She says: *First*, that the payment of said note was not a condition precedent to the continuance of the policy; that Thompson had the money in hand to pay the note, and intended to pay it, but, before the maturity thereof, he was taken violently ill, and before and at the time the same fell due was prostrated by fatal disease, and so remained until November 3, 1874, when he died, and during all that time was mentally and physically incapable of attending to his business, and was *non compos mentis*, and that the existence of the note was not known to plaintiff.

*Second*, That before said note fell due it had long been the custom of the defendant, in like cases, to give notice of the day of payment to policy holders, and was the uniform custom of insurance companies, and defendant had, in its dealings with John Y. Thompson, complied with such custom. Yet the defendant in this instance failed to give notice of the maturity of said note, although it knew that Thompson was in the city of Mobile, and was sick; that Thompson was ready to pay the note, had notice of its maturity been given, and that the plaintiff had no notice of the existence of the note.

*Third*, That on the 24th of January, 1874, said policy was renewed and extended for one year; that the note was for the residue of the premium for that year, which defendant agreed should be deferred as specified in the note; that by said agreement the policy was not to become void on the nonpayment alone of the note at maturity; but was to become void at the instance and election of defendant, and the defendant did not elect to cancel said policy or take any steps to avoid it, or give any notice of such intention during the life of said John Y. Thompson or since, and still holds said note, against the estate of said Thompson.

*Fourth*, That it was the general usage and custom of defendant not to

demand punctual payment of said premium notes at maturity, but to give thirty days' grace, and the defendant had repeatedly so done with said Thompson and others, and this led said Thompson to rely on such leniency, and he was thereby deceived and the note was not paid.

The defendant filed a demurrer which puts in issue the sufficiency of these replications as replies to the defence set up in the pleas.

Mr. *John T. Taylor*, for plaintiff.

Messrs. *Thomas H. Herndon* and *John Little Smith*, contra.

WOODS, Circuit Judge. The first replication presents the question whether the payment of the premium note was a condition precedent to the continuance of the policy. If no time had been given for the payment of the premium there could be no question that its payment for a year in advance was a condition precedent to the continuance of the policy for that year. The terms of the policy as set out in the pleas make this perfectly clear. Does the taking of a note for a portion of the premium change this rule, and make the payment of the note a condition subsequent? That it seems to me depends on the agreement of the parties. If the insurance company had simply agreed to continue the policy for a year, and instead of exacting the premium in cash, had consented to take the note of the assured, payable at a future day, undoubtedly the policy would be binding even though the note were not paid at maturity. But according to the pleas it was expressly stipulated that in case the note were not paid at maturity the policy should become void without notice to any party or parties interested therein. Ordinarily the payment of the annual premium was a condition precedent. This was changed by dividing the annual premium for the accommodation of the assured into several payments with the same stipulation in case of nonpayment. This was authorized by the terms of the policy. By the very terms of the contract between the parties the nonpayment of any of the instalments into which the annual premium was divided rendered the policy void. The fact that a note had been given for the instalment does not change the case, for as soon as the policy became void the note also became invalid for want of consideration. What effect the transfer of the note by the insurance company before maturity would have upon the question it is unnecessary to decide because no such fact appears in the case. "By taking a note for a portion of the premium, the rights and duties of the insurer and assured remain unchanged. Nor could an admission in the policy that the premium was paid preclude inquiring into the real facts." *McRae v. Purmart*, 16 Wendell, 460; *Robert v. New England Mut. Life Ins. Co.* 2 Bigelow, 145; *Slaughter v. Hamm*, 2 Ohio, 271; 1 Greenleaf's Ev. sec. 26.

We must give effect to the contract of the parties. It is plain and explicit, as set out both in the policy of insurance and in the note, that a failure to pay the note at maturity avoids the policy. The payment is, therefore, a condition precedent to the continuance of the policy. *Rochner v. The Knickerbocker Life Ins. Co.* 4 Daly, 512; *Howell v. Knickerbocker Life Ins. Co.* 44 N. Y. 276; *Patch v. The Phoenix Mutual Ins. Co.* 44 Vermont, 481; *Pitt v. Berkshire Life Ins. Co.* 100 Mass. 500; *Anderson v. St. Louis Mutual Life Ins. Co.* 3 Cent. Law Journal, 354; *Russum v. St. Louis Mutual Life Ins. Co.* 3 Cent. Law Journal, 275; *Robert v. New England Mut. Life Ins. Co.* 1 Bigelow, 634.

If the payment of the premium was a condition precedent, the fact that the assured was prevented from making payment by illness or other cause beyond his control, does not relieve him from the consequences of non-payment. *Howell v. Knickerbocker Life Ins. Co. supra.*

The fact that the plaintiff, for whose benefit the insurance was made did not know of the existence of the premium note does not change the rights of the parties. *Baker v. Union Mut. Life Ins. Co.* 43 N. Y. 283.

The first replication, therefore, which denies that payment of the note at maturity was a condition precedent to the continuance of the policy, and avers the fatal illness of the party whose life was assured as an excuse for nonpayment, is not a good answer to the pleas.

The demurrer to the second replication raises the question whether, in a case where it has been the custom of an insurance company to give notice that the premium, or a premium note, is about falling due, the failure to give such notice saves the policy from forfeiture when the assured fails to pay the premium.

As a general rule no duty is imposed upon the holder of a note or bill of exchange to give notice to the maker or acceptor of the day of payment, or to demand payment when it is due. It is the duty of the debtor to remember when his obligations fall due, and to find his creditor and pay him. The fact that the creditor has once or twice, or in a great number of instances, given notice to his debtor of the fact that his obligation was about to fall due, does not make it obligatory on him to continue the practice. A failure to give notice does not relieve the debtor from any of the consequences of nonpayment, unless it be averred that the custom to give notice and the omission were fraudulent, for the purpose of throwing the party off his guard. *Leslie v. Knickerbocker Life Ins. Co.* (N. Y. Court of Appeals), 5 Insurance Law Journal, 429; *Rochner v. Knickerbocker Ins. Co. supra*; *Appleman v. Fisher*, 34 Md. 553. But, see *contra*, *Meyers v. Mutual Life Ins. Co.* 4 Bigelow, 62.

The third replication alleges that after the failure to pay the premium note on October 24, 1874, the defendant company was by its contract required to elect whether it would declare the policy forfeited or not, and that it made no election and gave the plaintiff no notice of its election to forfeit the policy.

A careless reader of the replication might infer that it had reference to some contract or stipulation not already referred to in the previous pleadings. But it is not so averred in the replication; and taking the pleading most strongly against the pleader, this replication only puts a construction on the contract of the parties already set out, and does not purport to set out any new agreement.

The express stipulation of the policy was, that it was to become void without notice to any party or parties interested, in case the premium note was not paid at maturity. We cannot ignore this part of the contract. On nonpayment of the note at maturity, both the policy and the note became void. The policy might have been revived by consent of the insurance company during the life of the assured, but without such assent it remained void and of no effect. *Mutual Benefit Life Ins. Co. v. French*, 4 Bigelow, 369; Bliss on Life Insurance, §§ 179, 180.

The fourth replication sets up the fact that it was the custom of the

defendant not to exact punctual payment of the premium notes, but to give thirty days' grace for their payment, and defendant had repeatedly so done with said Thompson and others, and had thus led Thompson to rely on such leniency, whereby Thompson was deceived and the note was not paid.

This replication is clearly defective in not alleging that it was the custom of defendant to consider itself bound, without payment of the premium for thirty days, even in case of the death of the assured within that time. When default was made in the payment of the premium note, at whose risk was the life of the assured during the thirty days' grace? Was it the understanding of the company that if the assured died within thirty days after the maturity of the premium note it would pay the policy whether the premium note had been paid or not? If such were the fact, it should have been so averred. As the replication now stands, its fair construction is, that it was the custom of the company to receive payment of the premium note at any time within thirty days after its maturity, provided the assured were living at the time of payment. As there is no averment that the assured paid the premium within thirty days, and before his death, the replication is clearly bad. *May on Insurance*, §§ 352, 353, 354; *Mutual Benefit Life Ins. Co. v. Ruse*, 8 Ga. 534; *Ruse v. Mutual Benefit Life Ins. Co.* 23 N. Y. 516; *Pritchard v. Merchants' & Traders' Mut. Life Ins. Co.* 3 C. B. (N. S.), 622.

In my judgment the demurrer to all four replications should be sustained. The case appears from the pleadings to belong to that large class in which attempts are made to collect the insurance money without the payment of the premiums according to the contract of insurance. It is the duty of officers of insurance companies, who are acting as trustees for others, to resist all such attempts. The assured should comply with his part of the contract, or be excused therefrom by the act or agreement of the insurance company before any just claim can be set up to the insurance money.

There is no ground for a recovery in this case, upon the pleadings as they now stand.

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### SUPREME COURT OF NEW HAMPSHIRE.

(To appear in 56 N. H.)

EVIDENCE.—OPINIONS OF NON-PROFESSIONAL WITNESSES.—INSANITY.  
—PRACTICE.—RIGHT TO OPEN AND CLOSE.

#### HARDY v. MERRILL.

Non-professional witnesses, who are not subscribing witnesses to a will, may testify to their opinions in regard to the sanity of the testator, when founded upon their knowledge and observation of the testator's appearance and conduct. *Boardman v. Woodman*, 47 N. H. 120; *State v. Pike*, 49 N. H. 399; and *State v. Archer*, 54 N. H. 468, upon this point, overruled.



The party who affirms that a will was duly and legally executed, has the burden of proof and the accompanying duty of opening, and the right to close, no matter in what form the issues for trial may be drawn.

**APPEAL**, by William H. Hardy against Isaac D. Merrill, from the decree of the judge of probate approving and allowing, in solemn form, the will of Joseph Hardy, deceased. Said will was dated July 26, 1870. Issues had been made up at the law term, and sent to the circuit court for trial by jury. The issues were in common form. In the first, the executor alleged that the said Joseph Hardy was of sound mind; and in the second, he alleged that said will was not obtained by undue influence; upon both of which allegations issue was taken by the appellant.

In the circuit court the cause had been sent to referees, who, after hearing, found both issues in favor of the executor, and made an additional report raising certain questions of law, which are as follows:—

At the hearing, and before the same commenced before the referees, the appellant claimed the right to open and close. The referees ruled otherwise, and he excepted.

C. G. McAlpine, a witness for the appellant, testified as follows: "He (the testator) seemed to be all broken down [in mind and] in body." Words in brackets excluded, and appellant excepted. The same witness also testified that he tried to buy some bank stock of him (the testator) after his wife died. From that time to June, 1870, when I carried him, he had changed very much. [When I tried to buy his bank stock, I could see he was failing.] Words in brackets excluded, and the appellant excepted; but he was allowed to make the following statements, subject to the exception of the appellee: "His mind was such that he could not give any intelligent answer;" also, "At the time I carried him in 1870, he did not seem to have any memory;" also, "At the time I tried to buy his bank stock, I discovered that he had failed;" also, "His conversation was childish."

The same witness was asked, "How did his conversation, as to coherency and correctness, in June, 1870, compare with it at the time you tried to buy his bank stock?" which question was ruled out, and the appellant excepted.

Solomon Hardy, a brother of the testator, was called as a witness by the appellant, and the following questions, among others, were put to him:—

1. "Being a brother of Joseph Hardy, from your observation of his appearance and conduct at the time you saw him at your house in June, 1869, state whether or not, in your opinion, he was, at the time, of sound and disposing mind and memory."

2. "Being a brother of the testator, from what you had observed as to his conversation, conduct, and general deportment as to all subjects, up to July 26, 1870, have you any opinion as to his sanity at that date, and, if so, what is it?" The referees excluded these questions, and the appellant excepted.

Josiah C. Hardy, a witness for the appellant, testified, among other things, that the "testator appeared like a failing man in every respect," which was excluded, and the appellant excepted.

Madison M. Howe, a witness for the appellant, testified that the testa-

tor "appeared like a man who did not seem to know what he was talking about half the time," which was excluded, and the appellant excepted; but he was allowed to state, subject to the exceptions of the appellee, that "he (the testator) appeared very weak in his mind."

George B. Hardy, a witness for the appellant, stated, subject to exception of the appellee, that "he (the testator) appeared childlike—appeared feeble in body and mind—more like a child than a rational man."

Samuel C. Hardy, a witness for the appellant, testified that "it looked to me as though he was failing in his business capacity, or in his mind," which was excluded, and appellant excepted.

Lyman D. Stevens, a witness for the appellee, testified that he wrote the will in question for Joseph Hardy, at the office of the witness, and stated what said Hardy said and did on that occasion, which was some three weeks before said will was executed. He was asked the following question: "If there was anything in the conversation or conduct of Joseph Hardy, in your office, that indicated any impairment of any of his mental faculties, please state the same fully, without giving any opinion." *Ans.* "I observed nothing whatever." To this question and answer the appellant excepted.

In the circuit court, at the April term, 1875, it was ordered that the questions of law raised by the report of the referees be reserved and transferred to this court for determination.

*Mugridge*, for the appellant.

We submit that the question put to Solomon Hardy, the brother of the testator, whether he had any opinion as to the sanity of the testator when the will was made, and if so, what it was, was improperly excluded by the court.

We know that this suggestion is in conflict with certain decisions, referred to by the other side, in which this kind of testimony has been rejected; but feeling, as we do, that the existing rule on this subject is clearly wrong, we most respectfully ask the court to reconsider it, in the hope that, its fallacies appearing, it may be condemned as tending to subvert rather than promote the ends of justice, and as being no longer worthy of toleration.

The first time that the precise question now under consideration was before the court in this state was in *Boardman v. Woodman*, 47 N. H. 120, and the decision was then made by a divided court. The opinion of the majority of the judges in that case seems to be based on the general doctrine, recognized in some of the prior cases referred to by counsel on the other side, that ordinarily the opinions of witnesses other than experts are not admissible.

To show, however, that this rule, broadly stated as above, admits of a large class of exceptions, and was not intended by the court to be strictly applied, we cite the following cases, in which the opinions and judgments of witnesses are held to be competent under various circumstances: *State v. Shinborn*, 46 N. H. 501; *Whittier v. Franklin*, 46 N. H. 25; *Taylor v. Railway*, 48 N. H. 309; *Eastman v. Company*, 44 N. H. 155; *Hackett v. Railroad*, 35 N. H. 399; *Spear v. Richardson*, 34 N. H. 428; *Hall v. Davis*, 36 N. H. 571; *Paterson v. Colebrook*, 29 N. H. 101; *Beard v. Kirk*, 11 N. H. 401; *Whipple v. Walpole*, 10 N. H. 130; *Willis v. Quimby*, 81 N. H. 489; *Wheeler v. Blandin*, 22 N. H. 170.

We wish to refer the court, also, to the learned and exhaustive dissenting opinions of Judge Doe, in *State v. Pike* and *Boardman v. Woodman*, as indicating what we claim to be the true rule of evidence, and the one abundantly supported by the weight of judicial authority.

We would suggest, that no more odious law of practice exists than the one under consideration, and that its rigid enforcement is one of the greatest embarrassments and hindrances in the administration of justice that can be found in the practice of this state.

To render evidence as to mental condition competent, it must be purely and essentially descriptive in its character; and any statement partaking at all of the nature of an opinion is at once rejected. By witnesses who are not capable readily of making that accurate discrimination required to keep opinion and fact, oftentimes so intimately blended, separate in testifying, the rule is most difficult of comprehension, and much testimony is many times excluded on account of the inability of the witness to make the true distinction demanded.

To illustrate: Mr. McAlpine, in testifying, is not allowed to say that the testator "seemed to be all broken down in mind and body," because he was giving an opinion, and this testimony was excluded on that account; he was, however, permitted to say that "his conversation was childish," because that is held not an opinion, but mere description of his condition. He could not say that when he tried to buy his bank stock he "could see he was failing," but might say that at that time he "discovered that he had failed." One witness, Mr. McAlpine, was allowed to testify that he discovered at one time that the testator "had failed;" but the evidence of Josiah C. Hardy, that the "testator appeared like a failing man in every respect," was excluded as incompetent. Mr. Howe, another witness, could not state that the testator "appeared like a man who did not seem to know what he was talking about half the time," but was allowed to say that "he appeared very weak in his mind." To call upon ordinary witnesses to exercise that nicety of discrimination and refinement of learning necessary to make those bewildering distinctions required by the law, as appear by the above rulings made in the trial of this case, as the printed case shows, is simply ridiculous; it not only tends greatly to disconcert and hinder the witness in giving his evidence, but it makes the trial of any cause, governed by such a rule, a mere travesty upon the administration of justice, in the estimation of all sensible persons.

Again: we suggest that a class of evidence, which would with every intelligent jury be the most satisfactory, is now peremptorily excluded. A parent, brother, or friend, who may have associated with the testator on terms of the closest intimacy every day of his life, and become, by the closest observation and study, perfectly familiar with every phase of his character, no matter how great his learning and intelligence on other subjects, unless he has made mental diseases a study, so that he can be recognized as an expert in such matters, is debarred from expressing his opinion, while that of the expert, who never saw the party, and had no actual knowledge of him, upon a hypothetical case is admitted. Is it not a matter of familiar experience, that many persons who are not professional experts, from their means of knowledge are capable of giving opinions on

this question of mental derangement that would be intelligent and perfectly reliable, and of tenfold more importance than that of any expert?

We say that the policy and rules of law would be the wisest and best which would admit evidence of the kind indicated to be placed before the jury, leaving its weight and importance to be determined by the test of cross-examination.

Believing, as we do, that the view of this question so ably presented by Judge Doe in the dissenting opinions to which we have referred, and upon which we rely in this case, is much the fairer and better one, and that it is more in accordance with the practice in almost every state in the Union, as is abundantly shown by the authorities he has cited, we sincerely hope it may be adopted here, and that the existing rule may be rejected as being against reason and the weight of judicial authority.

II. If the old rule is to be adhered to, then we suggest that the testimony of the different witnesses of the appellant, referred to in the case as being excluded because in the nature of opinions, should have been received. Mr. McAlpine said that the testator seemed "all broken down in mind," and that he "could see that he was failing;" Mr. Josiah C. Hardy testified that he "appeared like a failing man in every respect;" and Mr. Howe, that he "appeared like a man who did not seem to know what he was talking about half the time." This testimony was excluded, and we say improperly; for we contend that it is not the opinion of the witnesses that is presented thereby, but that the evidence is purely descriptive of the old man's condition.

To say that a person appeared to be "failing," or like a "failing man in every respect," &c., is no more an opinion, than to say that a horse did not "appear frightened, but sulky," which was held competent in *Whittier v. Franklin*, before cited; or that he "appeared well and free from disease," held to be competent in *Spear v. Richardson*, 34 N. H. 428; or that a horse's "feet were diseased," which was admitted in *Willis v. Quimby*, 31 N. H. 489. We say, this testimony should have been admitted upon the grounds stated in above decisions.

III. As to the right of the appellant to open and close; we rely upon the logic and law of Judge Doe, in *Boardman v. Woodman*.

*Sargent & Chase*, for the executor.

1. The appellee had the right to open and close. The party who affirms that a will was made has the primary burden of proof, and the accompanying right to close, and it matters not which party is the appellant. *Buckminster v. Perry*, 4 Mass. 593; *Brooks v. Barrett*, 7 Pick. 94; *Goss v. Turner*, 21 Vt. 440; *Robinson v. Hitchcock*, 8 Met. 64; *Veiths v. Hogge*, 8 Clarke (Iowa), 163; *Perkins v. Perkins*, 39 N. H. 163, and cases; *Judge of Probate v. Stone*, 44 N. H. 593; *Boardman v. Woodman*, 47 N. H. 120. The form of the pleas in this case is such, that on the first plea the plaintiff had the primary burden of proof, to show that the testator was sane at the time of making the will; and that is a requirement which the statute prescribes and which must be shown affirmatively.

2. The questions to Solomon Hardy were not competent, he not being a subscribing witness to the will, nor an expert. The general rule, that the opinions of witnesses not experts are not competent evidence, is well

established and everywhere admitted. The subscribing witnesses to a will are an exception to this rule, well marked and defined. The statute has made another exception as to the value of property. Gen. Sts. ch. 209, sec. 24. There is no good reason why insanity should be treated as an exception to this general rule, and if any change were to be made, it would be better now for the legislature to make it, as they did in relation to the proof of the value of property. But the fact that the legislature has not changed, or undertaken to change, the rule which has been so long established and so uniformly applied in regard to insanity in this state, is the best evidence that the people of the state do not desire any change in that particular. *Hamblett v. Hamblett*, 6 N. H. 338; *Patterson v. Colebrook*, 29 N. H. 96; *Concord Railroad v. Greeley*, 23 N. H. 237; *Kingsbury v. Moses*, 45 N. H. 225; *Lowe v. Railroad*, 45 N. H. 370; *Boardman v. Woodman*, 47 N. H. 120, 133; *State v. Pike*, 49 N. H. 399; *State v. Archer*, 54 N. H. 468. The decisions in Massachusetts on this point have been uniformly in the same direction as our own. *Poole v. Richardson*, 3 Mass. 380; *Needham v. Ide*, 5 Pick. 510; *Com. v. Wilson*, 1 Gray, 337; *Baxter v. Abbott*, 7 Gray, 71; *Com. v. Rich*, 14 Gray, 335; *Com. v. Fairbanks*, 2 Allen, 511; and the people of that state have never seen fit to change the rule, though it has always prevailed there; the legislature has never seen cause to make such opinions competent evidence in that state.

FOSTER,<sup>1</sup> C. J., C. C. I. At the hearing before the referees, the appellant claimed the right to open and close.

In *Judge of Probate v. Stone*, 44 N. H. 593, it was held that the party on whom the burden of proof in the first instance devolved, was entitled to open and close; that to determine which party is to begin, and, of course, which shall close, is to consider which would get the verdict, if no evidence was given on either side; and the right to begin is with the one who in that way would lose his case.

In this case issues were joined by the appellant upon averments of the executor, — (1) that the testator was of sound mind, and (2) that the will was not obtained by undue influence. As these issues are made up, the burden of proof would seem to be on the executor, and not on the appellant; and in *Judge of Probate v. Stone*, at page 605, it is said: "The party who affirms that a will was made, has the primary burden of proof and the accompanying right to close."

In *Boardman v. Woodman*, 47 N. H. 120, 132, it is said: "Whatever form the issues which are sent to the trial term may assume in such cases, the nature of the proceeding is never lost sight of, nor is the final object to be attained to be kept from view. . . . The question to be determined, no matter in what form the issues may be drawn, is the due and legal execution of the will."

In *Perkins v. Perkins*, 39 N. H. 163, 167, Bell, C. J., says: "The object of the proceeding is to prove the due execution of a written instrument. . . . The instrument itself must be produced, unless in a few excepted cases where secondary evidence is admitted; and the attesting witnesses must be produced and examined, if they are living and within reach of the process of the court. They are to be produced by the party

<sup>1</sup> SMITH, J., having presided at the trial before the referees, did not sit.

who offers the instrument, or who seeks a decree that it has been proved. . . . The usual formal proof being offered, the law comes in with its presumption that the party is sane, and this presumption stands until evidence is offered tending to raise a different belief. . . .

"Though ordinarily no question need be asked of the witness who testifies to the execution of an instrument, relative to the capacity of a grantor, yet, owing to the nature of the proceedings in the case of wills, that the probate of the will is the foundation of the grant of power to the executor to take possession of the estate and the charge of administration, it is, in that case, the long-settled practice of courts of probate to require that the witnesses to wills should be examined as to the fact of the sanity of the testator before the will is established. . . . This practice is equally binding, as the law in such cases, upon the supreme court, as on the ordinary courts of probate. . . . It is, therefore, proper to say that the burden of proving the sanity of the testator, and all the other requirements of the law to make a valid will, is upon the party who asserts its validity. This burden remains upon him till the close of the trial, though he need introduce no proof upon this point until something appears to the contrary." To the same effect see *Tingley v. Cowgill*, 48 Mo. 291, and *Renn v. Samos*, 33 Tex. 760. On the other hand, it may be said, the decree of the judge of probate establishing the will was not vacated by the appeal. Gen. Stats. ch. 188, sec. 12.

The due execution of the will is not in controversy, and it is not necessary for the appellee to prove it. The appellant must set forth in writing the reasons of his appeal; and in this court he is restricted to such points as are therein specified. Gen. Stats. ch. 188, sec. 2; *Patrick v. Cowles*, 45 N. H. 553; *Boardman v. Woodman*, 47 N. H. 140.

The executor has formally tendered an issue upon the sanity of the testator, and the appellant has joined that issue; but the executor's allegation of sanity is supported, without evidence, by a presumption of law, as is said by Judge Bell, in *Perkins v. Perkins*, and he is entitled to a verdict unless the appellant assumes and discharges the burden of proof, which requires him to maintain and prove the insanity of the testator. See *Thurston v. Kennett*, 22 N. H. 151; *Bills v. Vose*, 27 N. H. 215, and cases there cited; *Boardman v. Woodman*, 47 N. H. 140-144; *Hall v. Unger*, 2 Abb. U. S. 507.

In Massachusetts, the statute requires the person offering a will for probate to prove the sanity of the testator — *Boardman v. Woodman*, page 125; but we have no such statutory provision.

In *Commonwealth v. Haskell*, 2 Brews. (Pa.), 491, it is held that on the hearing of a commission of lunacy, the burden of proof is upon the commonwealth, the presumption being in favor of sanity, and, therefore, that the relator has the right to open and close.

Probably the determination of this question is a matter of no practical consequence in the present case. The right, as it is called, to open and close, may be a matter within the discretion of the court, the granting or refusing of which is not in general a ground for a new trial or bill of exceptions. There are many authorities which hold that a verdict will not be disturbed on the ground that the wrong party was permitted to open or to close, unless it be made to appear that injustice

has been done. *Boardman v. Woodman*, at page 148; Hilliard on New Trials, 298.

I think the court would hardly be justified in entertaining a discretion which should operate in conflict with the general rule and practice in matters of this kind.

It is not without some hesitation, nor without respect for the adverse doctrine, that I concur in the opinion of the majority of the court that the ruling of the referees, in denying to the appellant the right or privilege of opening and closing upon the trial was correct.

II. The case before us involves an inquiry into the nature and extent of the exceptions to the general rule, that testimony of facts alone is admissible in courts of justice, and that the opinions of witnesses are to be excluded.

The same questions are presented which were considered by the late supreme court in *Boardman v. Woodman*, 47 N. H. 120, and *State v. Pike*, 49 N. H. 399. In both these cases a majority of the court sustained the doctrine of the exclusion of the opinions of non-professional witnesses upon questions of mental condition.

I am unable to speak from personal knowledge (because I was not then a member of the court) of the extent and amount of consideration bestowed upon the subject in the two cases referred to. It will, however, be obvious to the reader of the reports, that in *Boardman v. Woodman* the majority of the court were content, without renewed investigation, to adhere to the rule, which they understood to be "in accordance with the long established and uniform usage in this state;" while in *State v. Pike*, Smith, J. (not intimating his own views), disposes of the whole question with little more than the remark, — "A majority of the court are not disposed to overrule the very recent decision in *Boardman v. Woodman*, that witnesses who are not experts cannot give their opinions on the question of sanity." In *State v. Archer*, 54 N. H. 468, the court were not "prepared to overrule these decisions," nor were they prepared to investigate the matter. In view of all the other circumstances, and the established conditions of the case, this question was of slight consequence.

But the subject is so rapidly increasing in importance that its thorough reëxamination ought to be no longer postponed.

It is fair to presume that the majority of the court were satisfied, upon principle, with the reasons which had been expressed, or, rather, the conclusions attained in the courts of three states of the Union, where the same doctrine had been established; and, perhaps, the most elaborate investigation might not have affected their minds in such a way as to produce a different result; nevertheless, one fact cannot be ignored, namely, that a careful examination into the history of this branch of the law, as administered in our own state, would have compelled the suppression of the remark that the rule excluding such opinions was "in accordance with the long established and uniform usage in this state," the truth being that the usage and practice, if uniform, have been in the opposite direction, and that the rule, as declared by the supreme court in 1866 and 1869, is a departure from the "usage and uniform practice" in the courts of this state during a period of time when the bench was adorned by "sages of the law" whose learning and ability have commanded universal respect and admiration.

That the subject was not carefully considered in *Boardman v. Woodman*, but was passed over as a matter "well established," is manifest from the fact (which would otherwise be quite remarkable) that the cornerstone upon which the "long established" doctrine and usage in this state is said to rest, is the case of *Hamblett v. Hamblett*, 6 N. H. 333 (A. D. 1833). Now it is quite clear that no such established rule is there laid down. On the contrary, Judge Parker, fresh from the trial of Daniel H. Corey, was not prepared to stultify himself by promulgating doctrines upon the bench directly opposite to those which he had successfully maintained at the bar.

Accordingly, he declares that, "on the supposition that this testimony of Mary Palmer to matter of opinion, or, rather, to matter from which her opinion of sanity was to be inferred, was incompetent — *which is not conceded* if sufficiently connected with facts — the question arises whether this furnishes any ground for a new trial, the court having thus directed the jury;" but, "as to the direction of the judge relative to evidence of opinion, it may be proper to remark that we do not intend to be understood as establishing this as the rule. The weight of authority seems to be in favor of admitting the opinions of others than the witnesses to the will, if connected with evidence of the facts upon which those opinions are founded" — citing 8 Stark. Ev. 1707, in notes, *Grante v. Thompson*, 4 Conn. 203; *Hathorn v. King*, 8 Mass. 371; *Buckminster v. Perry*, 4 Mass. 594; and *Lowe v. Jolliffe*, 2 Wm. Black. 365. He continues: "It remains to be considered, whenever the question shall directly arise, whether this is not the most eligible and proper course in questions of this nature; but upon this matter it is not now necessary to make a decision."

The only other New Hampshire case referred to by the court, in support of the decision in *Boardman v. Woodman*, was *Low v. The Railroad*, 45 N. H. 370, where it was held that the opinion of a witness as to the value of a horse was inadmissible, although the same witness was allowed to express his opinion as to the size, weight, and speed of the same animal, these latter opinions being "received of necessity." That "necessity" being supplied, it was said by the court, "That there can be no necessity for receiving such opinions [of value] is obvious from the fact that all the materials for forming an opinion for themselves would be laid before the jury, whether the opinions of witnesses were to be received or not; and, judging from ordinary experience, the mere opinion of the witnesses would afford to the jury but little aid."

Perhaps this may be true (though I am not prepared to concede it) with regard to a horse, with which animal most jurors have some acquaintance; but I apprehend we should not have heard Judge Bellows using the same language with regard to a question of human sanity. On the contrary (from what we shall see, by and by, he has said), I infer that, if he had desired to be extremely cautious, he might have remarked, "There could be no necessity for receiving such opinions, if all the materials for forming an opinion for themselves could be laid before the jury; but, judging from ordinary experience, they cannot. Hence the necessity for admitting the evidence of opinion as being the best evidence of which the case is susceptible."



But to recur to the "long and well established usage in this state." *Hamblett v. Hamblett* was decided in 1833. We have seen that it does not sustain the position in aid of which it was invoked, but that the judgment of the court contains a very strong intimation that the doctrine of the admissibility of the opinions of non-professional witnesses upon a question of sanity had not been, and was not then likely to be, denied.

What was the anterior doctrine and usage which *Hamblett v. Hamblett* did not overthrow?

*State v. Ryan* was tried in Cheshire County, May, 1811, before Livermore, C. J., and Steele, J.; the attorney general, for the state; Chamberlain, Hubbard, and Vose, for the defendant.

One non-expert testified that he "had no idea, from what he saw of the defendant, that he was any way deranged;" another, that he "appeared like a man without sense;" another, that, on a certain morning, he was "perfectly rational; in the afternoon he became wild."

Judge Livermore, in summing up the testimony, particularly named the witnesses who, to use his own words, "testify that in their opinion he had not the use of his reason." See *State v. Pike*, 49 N. H. 417.

I have before me the pamphlet report of the trial of *Daniel D. Farmer*, before Richardson, C. J., Woodbury and Green, JJ., in 1821; Geo. Sullivan, attorney general, for the state; Richard Fletcher and Parker Noyes, for the defendant.

The dying declarations of the woman who was slain being material, the inquiries were made by the solicitor, "Had she her senses?" "Did she understand you?" The witness was unable to state. The court asked the witness, "Was the deceased sensible of what you told her?" Hon. Richard H. Ayer testified that the prisoner's *temper* was "mild and calm."

In 1825, Amos Furnal was tried at Dover for the murder of his child by starvation. Richardson, C. J., presided. The solicitor, Lyman B. Walker, was assisted by Levi Woodbury, in the absence of the attorney general. The prisoner's counsel were Jeremiah Mason and Stephen C. Lyford. Non-professional witnesses testified, without objection, — some, that the child "did not appear to be well dealt by;" others, that he "did not seem to be scanted;" one, that he was a bright, sprightly lad; another, that "he was not so bright as the other children — did not talk bright and sensible."

*State v. Corey* was tried in Keene, A. D. 1830, before Richardson, C. J., and Green and Harris, JJ.; Handerson, Wilson, and Chamberlain, for the state; Woodbury, Hubbard, and Joel Parker, for the prisoner.

The report of the trial, which I have before me, and from which I make a few extracts, is published "by Joel Parker." Against the solicitor's objection, and after argument and the citation of a Massachusetts case, the court permitted the defendant's brother to testify: "His father is crazy;" his sister "is wild as a hawk;" and six other non-professionals gave their opinion as to the prisoner's own mental condition, various witnesses for the state expressing adverse opinions. One witness testified that the defendant "looked and acted like a crazy person;" and another replied affirmatively to an inquiry by the court whether the defendant, on a certain occasion, "appeared rational." Judge Richardson, summing

up, told the jury that "the opinions formed the day before the homicide, by persons in a situation which enabled them to judge," were "entitled to great weight."

Such was the ignominious failure of the first attempt to introduce into this state the Massachusetts exception to a rule then entirely universal.

Then came on, in December of the same year, the case of *Hamblett v. Hamblett*, of which enough has been said.

In 1834, Abraham Prescott was tried in Merrimack County for murder, before Richardson, C. J., and Parker, J.; Geo. Sullivan, attorney general, for the state; Ichabod Bartlett, of counsel for the prisoner. It is safe to say that no accusation of a capital crime was ever more zealously and strenuously contested in this state by the distinguished lawyers who managed the defence; while the eminent attorney general omitted no part of his own duty.

I discover that no fewer than seventeen non-experts gave their opinions concerning the prisoner's mental condition, one testifying that the prisoner's father "was crazy at times;" his nephew "was crazy a number of times, to my knowledge;" a cousin of the defendant "is not in his right mind, but not so crazy as his father: the more cider he got, the more crazy he grew."

Mrs. Poor testified: Moses was "not half so insane as his father."

Mrs. Huntoon swore that Mrs. Blake was "occasionally a little out." "She appeared so different while I was there from what she formerly was, that I thought she was crazy."

Mrs. Rowe had seen Marston Prescott "often when he appeared crazy."

Chase Prescott (the prisoner's father) swore: "My father was occasionally deranged;" Marston was "crazy a number of years;" Benjamin "was crazy."

On the other hand, Benning W. Sanborn saw Mrs. Blake frequently, "but never considered her crazy." Hall Burgin "never saw anything like derangement in the boy" — the prisoner.

John Johnson "never discovered any symptoms of derangement," and many other witnesses never saw any exhibition of "symptoms of insanity," and always considered the prisoner "a person of sound mind."

Mr. Bartlett, commenting upon the value of the opinions concerning the insanity of his client's aunt, said to the jury: "They state facts in relation to her conduct and deportment, their own conclusions at the time, and the judgment and opinions of others, to whom the facts were known; they were inmates of the family, residents in her house. The insanity of his half-sister we prove by the testimony of his parents," &c. And Judge Richardson, in summing up, commented minutely upon this evidence, and the weight and importance to be given it.

It would be merely a repetition of the historical part of Judge Doe's opinion, in *State v. Pike*, 49 N. H. 421-423, if I were to relate how, after the eminent jurists, who presided in our courts between the years 1811 and 1833, had all passed off the stage, the "Massachusetts exception" gradually worked into favor in New Hampshire, it having been erroneously declared by the Massachusetts courts to be an expression of the English common law. It was a "silent, unauthentic growth," germinating in times so recent as when no judge remained upon the bench who

had participated in the decision of *Hamblett v. Hamblett*, or in the trial of the early cases; and the contiguity of Massachusetts, and the resort by lawyers and judges to her reports more than to any other printed decisions, no doubt had much to do with importing into our tribunals a rule and doctrine which was, undoubtedly, well established there.

It is proper for me to invite attention to the history of what I have called the Massachusetts exception. Beginning with *Poole v. Richardson*, 8 Mass. 330 (A. D. 1807), we find no very wide departure from the general rule of admissibility. The case holds that non-professional witnesses may "not testify merely their opinion or judgment." Judge Doe (*State v. Pike*, p. 410) suspects that "the only point ruled in this case was, that the witnesses were allowed to give their opinions when they stated particular facts from which the state of the testator's mind was inferred by them."

But the exception grew and dilated, finding larger and stronger expression along through the years and the course of the cases of *Hathorn v. King*, 8 Mass. 371; *Dickinson v. Barber*, 9 Mass. 225; *Needham v. Ide*, 5 Pick. 510; *Com. v. Wilson*, 1 Gray, 337; down to *Com. v. Fairbanks*, 2 Allen, 511 (A. D. 1861), when it was held *per curiam*, "that the incompetency of the opinions of non-experts was not an open question in Massachusetts;" though Judge Thomas had recently said, in *Baxter v. Abbott*, 7 Gray, 79, that "if it were a new question [he] should be disposed to allow every witness to give his opinion, subject to cross-examination upon the reasons upon which it is based, his degree of intelligence, and his means of observation."

In very recent times, however, we observe a more liberal disposition on the part of the Massachusetts courts. See *Barker v. Comins*, 110 Mass. 477 (A. D. 1872); and *Nash v. Hunt*, 116 Mass. 237 (A. D. 1874). In the former of these cases, it was held that persons acquainted with the testator, although neither witnesses to the will nor medical experts, may testify whether they noticed any change in his intelligence, and any want of coherence in his remarks. Gray, J., said: "The question did not call for the expression of an opinion upon the question whether the testator was of sound or unsound mind, which the witnesses, not being either physicians or attesting witnesses, would not be competent to give. The question whether there was an apparent change in a man's intelligence or understanding, or a want of coherence in his remarks, is a matter not of opinion but of fact, as to which any witness may testify, in order to put before the court or jury the acts and conduct from which the degree of his mental capacity may be inferred."

In *Nash v. Hunt*, a witness was allowed to say he observed no incoherence of thought in the testator, nor anything unusual or singular in respect to his mental condition. Judge Wells saying, — "We do not understand this to be giving an opinion as to the condition of the mind itself, but only of its manifestations in conversation with the witness." The witness could state, "as matter of observation, whether his conversation and demeanor were in the usual and natural manner of the testator or otherwise;" and in *Commonwealth v. Pomeroy*, 117 Mass. 149, non-professional witnesses were allowed to state, without objection, that the prisoner, "in conversation and manner, evinced no remorse or sense of guilt."

With deference and great respect I may be allowed to say, that I rejoice much more in the results attained in these later cases than in the *modus operandi* of judicial reasoning by which the conclusions were reached. They indicate decided and accelerating progress of the Massachusetts courts to the right direction. The full establishment of the true doctrine there is a question of time only.

A tolerably careful investigation authorizes me to repeat the language of Judge Doe, that "in England no express decision of the point can be found, for the reason that such evidence has always been admitted without objection. It has been universally regarded as so clearly competent, that it seems no English lawyer has ever presented to any court any objection, question, or doubt in regard to it." *State v. Pike*, 49 N. H. 408, 409.

I presume, however, it will not be denied that in the ecclesiastical courts, where questions of testamentary capacity are generally tried, such opinions have always been received. See 1 Gr. Ev. (12th ed.) sec. 440, n. 4; *Dow v. Clark*, 3 Addams, 79; *Wheeler v. Alderson*, 8 Hagg. 574, where Sir John Nicholl said, in pronouncing his judgment, "There is a cloud of witnesses who gave unhesitating opinions that the deceased was mad."

The practice in the courts of the common law has been universal and unwavering in the same direction; and "the number of English authorities is limited only by the number of fully reported cases in which the question of sanity has been raised." *State v. Pike*, 49 N. H. 409.

In the year 1800, James Hadfield was tried for shooting at King George III. The defence was insanity, and the opinions of non-expert witnesses were freely admitted; 27 State Trials, 1281 *et seq.*; and Mr. Erskine told the jury they "ought not to be shaken in giving full credit to the evidence of those who . . . describe him as discovering no symptoms whatever of mental incapacity or disorder." Erskine's Speeches (3d London ed.) 132, 140.

In *Egleton v. Kingston*, 8 Ves. Jr. 450, Ann Boak and Elizabeth Banson "expressed a strong opinion of the total incapacity of the deceased, both from his great imbecility of mind and the dominion . . . of Mrs. Kingston;" and John Fogg testified that "his faculties were very much impaired."

In *Lowe v. Jolliffe*, 1 W. Black. 365, the subscribing witnesses to a will having sworn that the testator was utterly incapable of making such an instrument, to encounter this evidence the plaintiff's counsel examined the friends of the testator, who strongly deposed to his sanity.

In *Tatham v. Wright*, 2 Russ. & Mylne, Lord Ch. Jus. Tindal, "in behalf of himself and the Lord Chief Baron," in reading the judgment of the court, commented upon the fact that "on the trial of this cause, for the purpose of proving affirmatively the general incapacity of Mr. Marsden, a very large body of parol evidence was produced by the defendants in the issue, comprising not fewer than sixty-one witnesses in number, some of whom deposed to the state of Mr. Marsden's intellect and the powers of his mind in very early life, and others continued the account down to a period very shortly before his death in 1826.

The greater part of this testimony came from non-professionals, and consisted in the expression of opinion.

Courts and text-writers all agree that, upon questions of science and skill, opinions may be received from persons specially instructed by study and experience in the particular art or mystery to which the investigation relates.

But without reference to any recognized rule or principle, all concede the admissibility of the opinions of non-professional men upon a great variety of unscientific questions arising every day, and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health; questions, also, concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention. See, in addition to the American cases cited by Judge Doe, in *State v. Pike*, *passim*, and the cases cited by the learned counsel for the appellant in argument, *Commonwealth v. Dorsey*, 103 Mass. 412; *McIntyre v. McConn*, 28 Iowa, 480, 483; *Dickinson v. Dickinson*, 61 Pa. St. 404; *Boyd v. Boyd*, 66 Ib. 283, 286, 290; *Pidcock v. Potter*, 68 Ib. 351; 1 Wharton's Cr. Law, sec. 48.

All evidence is opinion merely, unless you choose to call it fact and knowledge, as discovered by and manifested to the observation of the witness.

And it seems to me quite unnecessary and irrelevant to crave an apology or excuse for the admission of such evidence, by referring it to any exceptions (whether classified, or isolated and arbitrary) to any supposed general rule, according to the language of some books and the custom of some judges. There is, in truth, no general rule requiring the rejection of opinions as evidence. A general rule can hardly be said to exist, which is lost to sight in an enveloping mass of arbitrary exceptions.

But if a general rule will comfort any who insist upon excluding and suppressing truth, unless the expression of the truth be restrained within the confines of a legal rule, standard, or proposition, let them be content to adopt a formula like this: *Opinions of witnesses derived from observation are admissible in evidence, when, from the nature of the subject under investigation, no better evidence can be obtained.* No harm can result from such a rule, properly applied. It opens a door for the reception of important truths which would otherwise be excluded, while, at the same time, the tests of cross-examination, disclosing the witness's means of knowledge, and his intelligence, judgment, and honesty, restrain the force of the evidence within reasonable limits, by enabling the jury to form a due estimate of its weight and value. See 1 Redf. on Wills, 136-141.

Opinions concerning matters of daily occurrence, and open to common observation, are received from necessity; *Commonwealth v. Sturtevant*, 117 Mass.; and any rule which excludes testimony of such a character, and fails to recognize and submit to that necessity, tends to the suppression of truth and the denial of justice.

The ground upon which opinions are admitted in such cases is, that, from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons, not eye-witnesses, to form an accurate judgment in regard to it. *De Witt v. Barley*, 17 N. Y. 340; Bellows, J., in *Taylor v. Grand Trunk Railway*, 48 N. H. 309.

How can a witness describe the weight of a horse? or his strength? or his value? Will any description of the wrinkles of the face, the color of the hair, the tones of the voice, or the elasticity of step, convey to a jury any very accurate impression as to the age of the person described? And so, also, in the investigation of mental and psychological conditions,—because it is impossible to convey to the mind of another any adequate conception of the truth by a recital of visible and tangible appearances; because you cannot, from the nature of the case, describe emotions, sentiments, and affections, which are really too plain to admit of concealment, but, at the same time, incapable of description,—the opinion of the observer is admissible from the necessity of the case; and witnesses are permitted to say of a person, “He seemed to be frightened;” “He was greatly excited;” “He was much confused;” “He was agitated;” “He was pleased;” “He was angry.” All these emotions are expressed to the observer by appearances of the countenance, the eye, and the general manner and bearing of the individual,—appearances which are plainly enough recognized by a person of good judgment, but which he can no otherwise communicate than by an expression of results in the shape of an opinion. See Best on the Principles of Evidence, 585. It is on this principle, says Mr. Best, that testimony to character is received; as, where a witness deposes to the good or bad character of a party who is being tried on a criminal charge, or states his conviction that, from the general character of another witness, he ought not to be believed on his oath. Best on Ev. 657. “So,” continues Mr. Best, “the state of an unproducible portion of *real* evidence,—as, for instance, the appearance of a building, or of a public document which the law will not allow to be brought from its repository,—may be explained by a term expressing a complex idea, *e. g.*, that it looked old, decayed, or fresh; was in good or bad condition, &c. So, also, may the emotions or feelings of a party whose psychological condition is a question. Thus, a witness may state as to whether, on a certain occasion, he looked pleased, excited, confused, agitated, frightened, or the like.”

Considerations of this character controlled the opinion of the court in *De Witt v. Barley*, before cited. The learned judge, in delivering the opinion of the court, said: “To me, it seems a plain proposition, that, upon inquiries as to mental imbecility arising from age, it will be found impracticable, in many cases, to come to a satisfactory conclusion, without receiving, to some extent, the opinions of witnesses. How is it possible to describe, in words, that combination of minute appearances upon which a judgment in such cases is formed? The attempt to try such a question, excluding all matter of opinion, would in most cases, I am persuaded, prove entirely futile. . . . A witness can scarcely convey an intelligible idea upon such a question, without infusing into his testimony more or less of opinion. Mental imbecility is exhibited, in part, by attitude, by gesture, by the tones of the voice, and the expression of the eye and face. Can these be described in language so as to convey to one not an eye-witness an adequate conception of their force?”—and see Rand’s note to *Poole v. Richardson*, 3 Mass. (Rand’s ed.) 330.

The reasons drawn from necessity in cases of this kind are enhanced by the obvious consideration, that oftentimes the testimony of experts, if it

may be considered as possessing peculiar value, is, upon the required occasion, unattainable.

In very many forms of derangement, imbecility, idiocy, or more active insanity, the indications of mental disease being apparent to general and ordinary observation, a man of common sense and worldly experience can draw just inferences from them, as well without as with a scientific education.

The question of testamentary capacity is in strictness limited to a very brief period of time — the few minutes occupied by the attestation of the will. Evidence of a previous mental condition is, of course, competent, as tending to show that such previous condition probably continued and existed at the precise moment in question.

But experts are not ordinarily employed, like a corps of detectives, to "work up" the case, by inquiries concerning conditions antecedent to the execution of the will; neither, I suppose, are they usually brought to the testator's bedside for the purpose of attesting the instrument. It has never been disputed that the subscribing witnesses may testify concerning the actual mental condition of the testator as freely as medical experts, who speak from personal and professional acquaintance, study, and investigation, whether these subscribing witnesses happen to be the attending physicians, nurses, children, or chance strangers; but why they are admissible, simply as subscribing witnesses, has never been explained satisfactorily; and no good reason, I apprehend, can be assigned for any distinction in this respect between subscribing witnesses and any other.

In *Beaubien v. Cicotte*, 12 Mich. 459, Campbell, J., treating of this subject, says: "The reasons given by those courts which confine such testimony to these witnesses are based upon the assumption that they are called in for the special purpose of scrutinizing the capacity as well as the acts of the testator. It is matter of every-day experience, that wills made *in extremis* must usually be witnessed by any persons who are conveniently to be found; and it is not often that much care is taken to procure educated or peculiarly intelligent witnesses; nor is their attention, in fact, very closely addressed to the question of capacity, beyond what would naturally be the case with any other observers present.

"But be this as it may, the rule assumes that any person of ordinary capacity may form a reliable opinion concerning the condition of another, from simply witnessing the execution of a will which is rudely drawn up or discussed in the presence of the attesting witnesses. It is little short of absurdity to hold that persons, having equal or greater facilities derived from personal acquaintance and long intercourse, are not as competent to form opinions as those who are required to have no opportunity beyond one brief interview." See Mr. Rand's comments upon *Poole v. Richardson*. 3 Mass. (Rand's ed.) 380.

Now, as the question of the sanity or insanity of an individual is a question of conduct as well as a question of nosology, as a man is regarded as insane who acts in a way different from that of a majority of his fellows, it might well seem that the evidence of experts in such cases was inadmissible, since there can be no doubt that persons of common sense, conversant with mankind, and having a practical knowledge of the world, if brought into the presence of a lunatic, would in a short time be enabled

to form an accurate and reliable opinion, not, perhaps, of the specific and precise character of his insanity as referrible to a particular class of the insane malady, but certainly, in a general way, of his mental unsoundness. See Browne on the Med. Jur. of Insanity, sec. 506. Dr. Ray (Med. Jur. of Insanity, 5th ed. page 626) advises medical witnesses to be prepared with a well-ordered, well-digested, comprehensive knowledge of mental phenomena, in a sound as well as an unsound state, and recommends Shakespeare and Moliere as preferable text-books to Stewart and Locke, showing that it is the practical knowledge of character in its relation to conduct that he regards as the most important requisite, in the way of knowledge, of a medical witness.

I think it will be observed (and to my mind it seems that it must be inevitable) that wherever the rule is enforced, or rather attempted to be enforced, which allows only a recital of appearances to be given, it will be found that such facts inevitably involve opinions which the witness is unable to conceal, and which the utmost vigilance of judges cannot exclude.

These appearances are indeed facts, but they are facts which it is impossible to express, except in a way that shall indicate the opinion of the witness. Such opinions, as I have said, are therefore admitted *ex necessitate*.

It is impossible to prescribe the limits within which opinions are receivable, except by the application of this test: Is the employment of such testimony, from the nature of the case and its circumstances, the only way, or the best practicable way, of discovering the truth?

One hundred and thirty-one years ago, Lord Hardwicke said, in *Omychund v. Barker*, 1 Atk. 19 (S. C. Campbell's Lives of the Chancellors, Hardwicke Ch. 131, vol. 6, page 201, 5th Eng. ed.): "The judges and sages of the law have laid it down that there is but one general rule of evidence — 'the best the nature of the case will admit.'"

"The nature of the case" means, when employed in this connection, something more accurately described as "the nature of the subject." The authorities cited in *State v. Pike*, 49 N. H. 408, 409, and many others (to some of which I shall hereafter refer), show that the understanding and practice of English lawyers and judges always have been and now are perfectly unanimous on the question whether the nature of the mental conditions of calmness and excitement, peace and passion, love and hate, gentleness and ferocity, sobriety and intoxication, health and disease, is such that the opinions of non-experts, formed by personal observation of the appearance and conduct of an individual whose mental condition is in question, is the best evidence of that condition, within the meaning of the rule admitting the best evidence that the nature of the subject admits.

The meaning of the rule is best shown by examples. Nobody ever doubted that a non-professional man could testify that a certain neighbor, whom he had been accustomed to see, appeared one day to be well, and the next day to be sick. Although the testimony of a physician, as to some of the details of the apparent health and sickness of that neighbor, might be more satisfactory, and, in a certain sense, better evidence, the opinion of the non-expert on the general question of health and dis-



case, in that case, would belong to the class of the best evidence, within the meaning of the rule. And, so, also, with regard to a question of mental condition: a medical expert may be able to state the diagnosis of the disease more learnedly; but, upon the question whether it had, at a given time, reached such a stage that the subject of it was incapable of making a will or a contract because irresponsible for his acts, the opinions of his neighbors, if men of good common sense, would be worth more than that of all the experts in the country. Breese, J., in *Rutherford v. Norris*, supreme court of Illinois, November 4, 1875,—reported in the Chicago Legal News, December 11, 1875.

In the case referred to, the opinions of sixty common-sense witnesses, neighbors of the testator, were received in preference to those of the experts, Judge Breese remarking,—“We feel confident that we will be more likely to arrive at a just estimate of the mental condition and business capacity of the testator by relying on the accordant testimony of his life-long acquaintances and neighbors, with whom the testator was in frequent intercourse, rather than from the testimony of these medical gentlemen; and so would the jury.” On such questions the testimony of the expert and the testimony of the non-expert would both be the best evidence,—that is, would be parts of the class of best evidence, within the meaning of the rule.

Nobody ever supposed that the rule of the best evidence admitted no opinions of physical condition except those of experts, and confined experts to a description of those physical appearances which were the evidence upon which they formed their opinion of the man's being well or sick.

If the language of the rule were required to be strictly interpreted, one expert would have to be excluded if it were made to appear that another expert was better qualified, because the testimony of the former would not be the best.

When the question is, upon a *post-mortem* examination and a dissection and chemical analysis of the stomach and its contents, whether the scientific indications in that organ were of the presence and action of arsenic or strychnia, the opinion of a mere lawyer, farmer, or blacksmith would not be the best evidence in any sense, but would be good for nothing; and as no one would think of asking their opinion on that physiological and chemical question, so no one would think of rejecting their opinion, based on their own observation of the deceased the day before his death, that he then appeared to be well or sick. Suppose, the day before or a week before death, a lawyer, farmer, and blacksmith saw the deceased, and had an opportunity to see whether he appeared to be well or sick: suppose the lawyer is asked, “Did you observe any indications of his being well or sick?” and the answer to be, “I observed no indication of his being sick; he appeared as well as usual; as well as I ever saw him:” suppose the farmer is asked, “Did you notice anything unusual in his appearance or conduct?” and the answer is, “No, I did not:” suppose the blacksmith is asked, “In your opinion, was he well or sick?” and the answer is, “In my opinion he was perfectly well; his spirits, looks, and behavior all showed, in my opinion, freedom from weakness and pain:” what legal distinction can be drawn between these questions

and answers, to make one competent, and either of the others incompetent? It is all opinion, and nothing but opinion, of the man's physical condition in relation to health or disease. The use or the omission of the word "opinion," in either of those questions or answers, does not affect the character of the testimony in the slightest degree. Calling such testimony "opinion" does not make it "opinion;" and calling it something else (as in *Barker v. Comins* and *Nash v. Hunt*, before cited) does not make it something else. It is opinion, not because the word "opinion" is used, but because it is the judgment of the witness, exercised upon what he personally saw and heard of the deceased, and the conclusion of his own mind upon the question of physical health or disease, — a conclusion formed by the witness, not by the jury, and formed upon sights and sounds which enabled the witness to form an opinion satisfactory to himself, although it is one which he might be unable to describe to a jury so as to enable them to form as satisfactory an opinion as they would if they had seen and heard what the witness saw and heard; and such evidence is more valuable than the testimony of experts unacquainted with the testator. See Redf. Cases on the Law of Wills, 89.

When the witness describes what he saw and heard, as well as he can, his description may (as it often must) fall far short of being the best evidence. *State v. Pike*, 49 N. H. 414, 415, 423. When he adds to his description the impression made upon his own mind by the things, appearances, and transactions described, the jury have evidence of the class called the best, though it may not be so good as the opinion of a skilful physician. The rule requiring the best evidence relates to its grade only, and not to its conclusiveness. Thus, the evidence of a bystander is competent to prove where lines were run in a private survey, though the surveyor be living. *Richardson v. Milburn*, 17 Ind. 67. As the opinion of one expert may be better than the opinion of another expert, so the opinion of one farmer may be better than that of another farmer in relation to the quality of a load of hay; but, coupled with such a description of the hay as they can give, their opinions of its quality are both of the class of evidence called the best, although the fact that well-fed cattle ate the hay very greedily, or that half-starved cattle would not eat it at all, would be better evidence than the opinions or the descriptions given by the farmers. The opinion of one farmer would not be excluded because the opinion of another was better; and both their opinions would not be excluded because the opinions of the cattle would be better than either of theirs.

In *Darling v. Westmoreland*, 52 N. H. 401, 403, the defendants, arguing that evidence of Fletcher's horse being frightened was incompetent, suggested that, "at best, it was evidence of an admission or a declaration, by Fletcher's horse, that the alleged obstruction looked frightful to him, and . . . not even a declaration under oath at that." But the court, holding that the fright of Fletcher's horse was as competent as the fright of the plaintiff's, affirmed the doctrine of *Whittier v. Franklin*, 46 N. H. 23, that the fright of a horse might be proved by witnesses testifying that he "appeared to be frightened, or that in their opinion he was frightened, or (to omit superfluous words, and speak in that positive manner in which witnesses would generally testify on such a subject) that he *was* frightened." P. 403.

A non-expert may testify that he thought a horse "was not then sound: . . . his feet appeared to have a disease of long standing;" *Willis v. Quimby*, 31 N. H. 485, 487; that a horse "appeared to be well, and free from disease;" that he thought "he never saw any indication of the horse being diseased." *Spear v. Richardson*, 34 N. H. 428-431. These two cases relate to the physical condition of a horse. The same doctrine is equally well settled in relation to the mental and moral condition of a horse, so to speak; for, in *State v. Avery*, 44 N. H. 392, 393, it was held, — Bellows, J., — that a non-expert might testify, on an indictment for cruelly beating a horse, that the horse drove like a pleasant and well-disposed horse, unless when harassed by the whip; that, at the time of the beating, he saw no viciousness or obstinacy in the horse, and that the blows appeared to affect the horse in a particular manner. The evidence was opinion, and nothing else; and it was opinion of the mental and moral condition of the horse, judged of by the witness from actions which it was impossible for the witness to describe in any better or more satisfactory way, so as to give the jury the best evidence the nature of the subject permitted.

In *Whittier v. Franklin*, 46 N. H. 23, an action for a defective highway, — one point of the defence being that the plaintiff's horse, which he was driving at the time of the accident, was vicious and unsafe, and that the plaintiff's injuries were caused by the vices of his horse, — it was held, — Bellows, J., delivering the opinion of the court, — that a non-expert who witnessed the accident might testify that "he did not see any appearance of fright; that the horse did not appear to be frightened in the least before he went off the bank, or afterwards; that he appeared to be rather a sulky dispositioned horse to use." Judge Bellows cites *People v. Eastwood*, 14 N. Y. 562, where it was held that opinions as to whether a person is intoxicated may be received; *Milton v. Rowland*, 11 Ala. 732 — opinions as to the existence of disease, when perceptible to the senses; *Bennett v. Fail*, 26 Ala. 605 — opinion that a slave appeared to be healthy; and other cases in relation to opinions of a healthy or sickly condition of body. He also cites *Spear v. Richardson* and *Willis v. Quimby*, before referred to, as to opinion of health of horses. The very learned judge says that the substance of the statement of the witness is, that the horse did not appear to be frightened, but appeared to be sulky; that, on such subjects, persons of common observation may and do form opinions that are reasonably reliable in courts of justice, from marks and peculiarities that could not in words be conveyed to the minds of jurors, to enable them to make the just inferences; that it is much like the testimony that a horse appeared well and free from disease, or that a person appeared to be healthy, or intoxicated. P. 26. The evidence was held admissible as an opinion.

What reason is there for allowing a witness to testify that a horse appeared to have a sulky disposition, and not allowing the same witness to testify that a man appeared to have a similar disposition? What difference whether the witness says, "He appeared to have a sulky disposition?" or, "In my opinion, based upon my own observation of him, he had a sulky disposition?"

A non-expert may give his opinion on the physical health of a man,

as well as on the physical health of a horse—*State v. Knapp*, 45 N. H. 148-150; may give his opinion not only that a horse did not appear to be frightened, but also that a lady did not seem to be frightened or excited. *Taylor v. Railway*, 48 N. H. 304, 306, 309.

The opinion of non-experts in relation to mental condition is not limited to the question of a mental disturbance caused by fright. In *Bradley v. Salmon Falls Manufacturing Co.* 30 N. H. 487, 491, it was held that a non-expert might testify that the plaintiff "seemed satisfied" with a business arrangement proposed to him by the witness.

In *McKee v. Nelson*, 4 Cow. 855, it was held that, in an action for a breach of promise of marriage, a witness, who knew the plaintiff and had observed her conduct and deportment towards the defendant, was permitted to express his opinion that the plaintiff was sincerely attached to the defendant,—"a fact," said Judge Selden, "which it is plain could be proved in no other way;" and this decision was cited as undoubted law by Judge Parker, in *Robertson v. Stark*, 15 N. H. 114, 115. In *McKee v. Nelson*, the court say: "There are a thousand nameless things, indicating the existence and degree of the tender passion, which language cannot specify,"—precisely what Judge Bellows, in *Whittier v. Franklin*, said of the frightened mental condition and sulky disposition of a horse.

Better illustrations, I think, could not be had of the meaning of the rule admitting the best evidence.

A boy works many years on a farm: and the question arises, What was the value of his services? Suppose he is dead, as is the subject of inquiry in this and every testamentary case: one of the material questions would be whether the boy was bright or stupid, amiable or morose. What evidence on these points would be so satisfactory as the opinions of the intelligent and disinterested farmers in the neighborhood, who knew him well? If there was a general concurrence in their opinions, one way or the other, would it not be decisive?—and, if there was not a concurrence, would not the cross-examination as to the grounds and reasons of their opinions generally show the facts much better than any statement of facts without opinions?

What facts without opinions can any parent state as to his own children, to give a stranger any such tangible and satisfactory information of their mental and moral peculiarities as is given by an expression of his opinion?

Of very many states of mind, as we have already seen, the opinions of non-experts are competent evidence. What lawyer of considerable experience or observation, in the courts of this or any other jurisdiction, has not heard such evidence given without objection, and no objection made, because every lawyer and judge felt that it was the best evidence?

A man is tried for the murder of his wife: it is material to know how his mind was affected when he was first informed of her death. A witness, who says he told the prisoner of it, is asked how the prisoner was affected; the answer is, "He was very much overcome;" or, "He seemed very much overcome;" or, "I thought he was deeply affected;" or, perhaps, "The news did not disturb him at all;" or, "He showed no signs of grief;" or, "I saw no indications of sorrow;" or, "He

seemed depressed and gloomy." Did anybody ever object to such evidence? and, if any objection was ever made on the ground that it was a matter of opinion, was the objection ever sustained? Was such evidence ever excluded here or anywhere else? Evidence of this character was received a few weeks ago, in the trial of Magoon for murder, in Rockingham County, without the intimation of a doubt concerning its competency; and the very able and vigilant counsel upon both sides, in that cause, knew what they were about, and omitted nothing of their duty to the prisoner or to the public.

And such evidence is not confined to the various mental conditions of health; it is also received in relation to mental disease. They who attended the death-bed of a testator are called to testify concerning his mental condition. One says: "A week before his death he was sick and confined to his bed—very weak—not able to sit up, but in other respects he appeared as usual." "As usual" means, in such a case, sane, sound in mind, of a healthy mental condition. "He appeared natural," is the universal expression of ordinary witnesses testifying to sanity. "If 'unnatural,' by its peculiar use in this connection (said Judge Doe), should, in evidence, come to be synonymous with 'insane,' as 'natural' is understood to be synonymous with 'sane,' the legal question now under consideration would dwindle to a point of literary taste." *State v. Pike*, 49 N. H. at page 427; and see *Boardman v. Woodman*, 47 N. H. at page 146.

But one witness says: "He did not appear as usual; he did not appear natural." Now let us imagine a scene that might very probably be exhibited in any court where the Massachusetts rule, prevails:—

"Very well," says a learned barrister, "very well. Mr. Witness, you may say that,—that is quite regular,—that is your opinion. Now tell us in what respect he did not appear 'as usual,' or 'natural.'" "Well, I can't describe it, but I should call it wandering, delirious; he was incoherent in his talk." "Very well, Mr. Witness, you acquit yourself like a sensible man. Now tell the jury whether, in your opinion, he was then of sound mind." "I object!" thunders the learned barrister on the other side. "I object!" exclaims the opposing junior—"counsel know better. It is an insult and outrage to put such a question." "I object!" "I object!" echoes from every side. The court-room is in an uproar. The judge has to exert himself to restore order and keep the peace. The lawyers on each side are all talking at the same time in a very delirious and incoherent manner. The witness is confounded. The jury are confounded. Everybody is confounded, except those who understand that "incoherent of thought" and "delirium," vulgarly called "wandering," is not a state of mental unsoundness,—is not mental disease; and that "as usual," or "natural," is not a condition of mental health. Whether it is such condition or not is a question then solemnly debated. After a profound discussion by counsel, and a thorough consideration by the judge, he rules that the witness may say that the deceased was delirious, but must not say he was of unsound mind, because the witness, not being an expert, is not qualified to form an opinion on the general question of mental health or mental disease.

That ruling is made in Maine (because it was once a part of Massa-

chusetts), in New Hampshire, in Massachusetts, and in Texas (*Jehrk v. The State*, 13 Texas, 568), and nowhere else in the civilized world.

At the close of the scene which I have described, not a man of the laity goes out of the court-room without being disgusted with this exhibition of the law, as a system of arbitrary rules, that, ignoring all legal ideas, decides upon a distinction purely verbal. And why should not the laymen be disgusted with the senseless subtlety which permits one party to show by his witness that a testator "appeared perfectly natural," and forbids the adverse party to offer the testimony of another witness that "he did n't appear to be in his right mind?"

In the case now before us, the learned judge and his associates, to whom the trial was referred, evidently and inevitably experienced great embarrassment and confusion of mind in their effort to conform to the supposed rule. The futility of their endeavors is notably apparent.

Mr. McAlpine was permitted to say of the testator, "He seemed to be all broken down in body," but was forbidden to say, "He seemed to be all broken down in mind;" and yet, the same witness (without specification of mental or bodily infirmity) was permitted to say that, between certain dates, "He had changed very much;" "His mind was such that he could not give any intelligent answer;" "He did n't seem to have any memory;" "I discovered that he had failed;" "His conversation was childish."

The following questions were ruled out:—

First. "Being a brother of Joseph Hardy, from your observation of his appearance and conduct at the time you saw him at your house, in June, 1869, state whether or not, in your opinion, he was at the time of sound and disposing mind and memory."

Second. "Being a brother of the testator, from what you had observed as to his conversation, conduct, and general deportment as to all subjects, up to the 26th day of July, 1870, have you any opinion as to his sanity at that date, and if so, what is it?"

Mr. Hardy was not allowed to say that the testator "appeared like a failing man in every respect."

Another witness was forbidden to testify that the testator "appeared like a man who did n't seem to know what he was talking about half of the time;" but he was allowed to state that "he appeared very weak in his mind."

Another non-expert was permitted to testify, "He appeared child-like, — appeared feeble in body and mind, — more like a child than a rational man;" but another witness was not allowed to state, "It looked to me as though he was failing in his business capacity, or in his mind."

And, finally, another witness, being expressly cautioned and charged to beware of expressing any "opinion," was permitted to say: "I observed nothing whatever, in his conduct or conversation, indicating any impairment of any of his mental faculties."

The Massachusetts rule is, that non-experts' opinion shall be excluded; but the rule itself does not exclude them. It only excludes the use of certain words. It admits the opinions, and merely embarrasses the witness and confounds the jury by requiring the witness to express his opinion without using certain forbidden terms, and by using others that are

understood by the jury and everybody else to be precisely synonymous. A non-expert, who has been watching by the bedside of a sick man, may say, "He was delirious all night;" a farmer may say that his neighbor's boy is so lacking in intelligence as to be "below par;" anybody may say that a man was "crazy drunk;" that a testator did n't seem to understand anything that was said to him — seemed senseless, unnatural, not as usual; or, that "no change was perceptible in his intelligence," "no incoherence of thought," nor anything unusual or singular in respect to "his mental condition;" was healthy or sickly in body; but in giving his opinions of mental health or disease, the non-expert must not use the words "sane," "insane," "mentally disordered," or "deranged." So far as he can find synonymes for these words, circumlocutory but equivalent, he may express his opinion in them, and welcome; but let him beware of using those cabalistic words, on pain of the displeasure of those who understand that such terms as "delirious" and "idiotic" are not expressive of an opinion of the presence and operation of mental disease.

Whether "out of his head" is one of the phrases in which a non-expert may give his opinion, or whether it is one of the forbidden cabala, is a question concerning which information is wanting.

The selection of the phraseology in which such an opinion may be expressed, and that in which it cannot be uttered, depends on no legal principle, but on the mere whim of the court. Such an arbitrary and senseless choice or rejection of terms in which to express an admissible opinion is mere sheer logomachy, a waste of precious time given us for better purposes, a verbal quibble unworthy of the law, and calculated to bring it into contempt.

It would be superfluous for me to add that I fully concur in the views and opinions expressed by Judge Doe in *Boardman v. Woodman* and *State v. Pike*, and that I cordially indorse the remarks of Judge Redfield (11 Am. Law Reg., N. S. 259), as follows: "The learned judge shows very conclusively, both upon authority and reason, that the opinion of the unprofessional witnesses, in such a case, is commonly far more reliable as a basis of ultimate decision, in questions of sanity and mental capacity, than any specific facts which could possibly be gathered from the witnesses. We have said in our book on Wills, and in other places, all that we could desire to say, both as to the rationale of the rule and the support which it receives from authority. The tendency of the American courts in the last few years has been largely in the direction contended for by the learned judge; and there seems to be little question that it must ultimately prevail all but universally. We should rejoice at such a result, as greatly tending towards the establishment of truth with greater facility and certainty in a very important class of cases." See 1 Redf. on Wills (4th ed. A. D. 1876), 138-145, where many other cases than those hereinbefore alluded to are cited and commented upon.

Thus supported upon principle and authority, I am satisfied that the time has arrived when this court is called upon to declare the law to be in conformity with the views I have expressed.

LADD, J. I think it is shown by proofs which fall little, if at all, short of demonstration, that the doctrine excluding the opinions of non-experts on the question of insanity has grown up in this state within the memory

of men now living in the profession; that it had no place in the common law brought here from England, nor in the jurisprudence or practice in this state, from the Constitution down to a comparatively recent date; that it is contrary to reason, extremely difficult of application, and inconvenient in practice; that the great weight of judicial opinion and authority outside this state is against it; and that, even if we look at the condition of authority as shown by the expression of judicial opinion and practice in this state, the balance cannot fairly be said to be in favor of the rule. No titles are to be disturbed by adopting a rule more consonant with reason, and which accords with the almost universal practice in jurisdictions where the common law is used the world over. I therefore concur fully with my brother Foster in the conclusions at which he has arrived.

CUSHING, C. J., concurred.

*Case discharged.*

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### SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1875.]

NEGOTIABLE INSTRUMENT SIGNED IN BLANK. — AUTHORITY OF HOLDER  
IN RESPECT OF SUCH INSTRUMENT.

ANGLE v. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

Where a party to a negotiable instrument with blanks unfilled intrusts it to the custody of another for use, such negotiable instrument carries on its face an implied authority to fill the blanks necessary to perfect it. The rule is, that as between the holder to whom the instrument is intrusted and innocent third parties, the holder is to be regarded as the agent of the party committing it to his custody for the purpose of filling the blanks. But there is no implied authority that the holder may do anything more than *fill the blanks*. Any erasure or addition amounts to forgery and renders the instrument void. Nor is actual notice of any alteration necessary if the instrument shows the alteration on its face.

These doctrines are applicable to an order for the delivery of funds signed by the authorized officer of an insurance company and intrusted to a sub-agent.

APPEAL from the circuit court of the United States for the District of Iowa.

Mr. Justice CLIFFORD delivered the opinion of the court.

Persons dealing with an agent are entitled to the same protection as if dealing with the principal, to the extent that the agent acts within the scope of his authority.

Pursuant to that rule it is settled law that where a party to a negotiable instrument intrusts it to another for use as such, with blanks not filled up, such instrument, so delivered, carries on its face an implied authority to complete the same by filling up the blanks; but the authority implied from the existence of the blanks, would not authorize the person intrusted with the instrument to vary or alter the material terms of the instrument



by erasing what is written or printed as part of the same, nor to pervert the scope and meaning of the same by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument before it was so delivered.

By virtue of the implied authority, such a depository may perfect, in his discretion, what is incomplete, by filling the blanks, but he may not make a new instrument, by erasing what is written or printed, nor by filling the blanks with stipulations repugnant to the plainly expressed intention of the same, as shown by its written or printed terms. *Goodman v. Simonds*, 20 How. 361; *Bank v. Neal*, 22 Ib. 108.

Much reference to the pleadings will be unnecessary, as the questions presented for decision arise chiefly out of the facts deducible from the proofs exhibited in the record. Suffice it to say, in that regard, that the suit was instituted by the complainant to procure a decree that the bond and mortgage, and the two fire insurance policies described in the bill of complaint, were delivered and assigned to the respondents without consideration, and to obtain a decree setting aside said bond and mortgage and for a return of said policies, the same having been delivered to the respondents as additional security for a loan of ten thousand dollars, the proceeds of which never came to the hands of the complainant; and he charges that the proceeds of the loan were never forwarded to him by his authority; that if the insurance company ever paid the same in current funds to the person through whom the loan was negotiated, upon any order signed by him, as pretended by the respondents, the order was forged by the party who presented it or by some person interested, to cheat and defraud the complainant out of the money.

Service was made and the corporation respondents appeared and filed an answer, in which they allege that the bond, mortgage, and fire policies were duly delivered to the company by the agent of the complainant, and they deny that the order for the payment of the proceeds of the loan was forged, and aver that they made the payment to the person who presented it, in good faith. Proofs were taken, and the court, having heard the parties, entered a decree dismissing the bill of complaint, and the complainant appealed to this court.

Sufficient appears to show that the respondents are a corporation created by the laws of Wisconsin, and that they were doing a life insurance business throughout the Northwestern States, and it also appeared that they were accustomed to loan money on real estate securities. Agents were appointed by the respondents in the different states, whose duty it was to solicit applications for policies and to transact other matters connected with their insurance business.

State agents were appointed by the company, but it is conceded that they in turn appointed sub-agents to perform the same duties, and it appears that the commissions for all such services were paid by the company to the state agents.

Applications for loans of money were frequently made to the company through the state agents, and it appears that such agents of the company were furnished with blank forms for such applications and for the appraisal of real estate intended as security for such loans. When an application for a loan was made the blank forms were filled up by the agent,

and it was the business of the borrower to furnish abstracts of the title of the real estate offered as security, all of which were transmitted by the agent to the home office for examination, and if approved, the course of business was that the bond and mortgage were prepared and forwarded to the agent to be delivered to the applicant for execution and return.

Of course the applicant might still refuse to execute the bond and mortgage, but if he was satisfied with the terms of the instruments, and completed the same, they were given back to the agent and were by him returned to the company, and it seems that the money loaned was usually transmitted to the applicant by means of a draft payable to the order of the borrower, or, in certain cases, the money was paid by the company at the home office, pursuant to the written order of the borrower, evidenced by a receipt on the back of the order by the person in whose favor it was drawn. Such papers from the home office to the borrower and from the borrower to the company, it is conceded, are usually mailed to the state agent, and that they pass through his office; but it is insisted by the respondents that he has no interest in the business, and that he receives no compensation from the company for his services.

Sub-agents, it is conceded, were employed by the agents appointed by the company, and it appears that I. T. Martin, during the winter and spring of 1871, was a regular agent of the company, appointed for the State of Iowa, and that he employed one C. W. Copeland as sub-agent, to solicit applications for life insurance, and that Copeland claimed to be the agent of the company to effect loans in their behalf on security of real estate, and that he represented to the complainant that he, the sub-agent, could procure for the complainant a loan from the company of ten thousand dollars on such security.

Both the complainant and Copeland then resided at Cedar Rapids, and it was at that place, and about that time, that the former was introduced to the latter, and it appears that Copeland was, at that time, canvassing for the company, to procure customers to take policies in the company, and to induce persons to take loans from the company on security of real estate. About the same time Copeland published a card in one or more of the local newspapers, representing that he was the agent of the company, and it appears that he exhibited to the complainant pamphlets, circulars, and other documents of the kind prepared and distributed by the state agents, as the means of extending the business of the company, and that notice was published by the same party, in one or more of the local journals, in which he is described as the agent of the insurance company.

Evidence entirely satisfactory was introduced, showing that it was during that period that the complainant commenced negotiations with Copeland to obtain for him a loan from the company for the sum of ten thousand dollars, to be secured by bond, and mortgage of real estate. Conversation ensued between them, and the evidence shows that Copeland told the complainant that he was going to quit preaching, and that he had made arrangements to act as attorney for the said insurance company; that he had already secured a loan for one person; and that, being an intimate friend of the general agent, he could get the money whenever he recommended a loan.

Blank forms were requisite, and it appears that Copeland furnished the complainant with a printed blank form of an application for a loan, and that he requested the complainant merely to insert the description of the property to be offered as security and his valuation of the same, stating that he, the agent, would fill the other blanks and send the application forward. Accordingly the complainant inserted the description of the property, giving his valuation of the same in figures, and also gave the name of his wife, and the date of the instrument, and his own name and place of residence. Incomplete though the instrument was, yet the witness states that he delivered it to Copeland, and that he, the witness, never saw it afterwards until he gave his deposition in the case, and that the indorsements on the back of the instrument were not there when it left his possession.

Due notice was received by the complainant, from the president of the company, that his application for the loan was accepted, and he was also informed, in the same communication, that abstracts of the title of the property and certain certificates were required to show that the property was free of incumbrances and liens, and that when the same were received, if found to be correct, that their attorney would prepare the bond and mortgage and forward the same to him for execution.

Such abstracts and certificates were procured by the complainant, at the instance of Copeland, and they were delivered by the complainant to him at his request, and it appears that Copeland presented to the complainant the bond and mortgage, ready for his signature, he having procured the signature of the complainant's wife to the mortgage before the instruments were exhibited to the complainant for execution. They were signed by the complainant at his house, no one being present except his wife and Copeland, and the complainant testifies that he then and there delivered the same to Copeland, together with two fire policies of insurance, in order that the fire policies might be indorsed by the agent of the companies issuing the same, in a way to make the loss, if any, payable to the corporation respondents. Decisive proof that Copeland received the bond and mortgage for record and transmission is also exhibited by the receipt which he gave in behalf of the company and which he signed as agent.

Throughout the whole transaction the negotiations with the complainant were conducted by Copeland, and the evidence shows beyond doubt that all the instruments and documents which were delivered by the complainant to Copeland were by him delivered or transmitted to the state agent of the company, and that they were all forwarded by the latter to the company at their home office, where the officers of the company transact all their business.

Such applications for loans are usually made direct to the executive committee, and are required to be signed by the party desiring the loan, and when the loan papers have been perfected the company pay to the owner directly, either in checks or drafts *to his order*, unless the borrower, by written request or order, may have otherwise directed; but the president, in his testimony, admits that the state agent sometimes forwards applications to the executive committee for parties residing in the state, and that the home office does advise such parties, through him, of the

action of the company in respect to such applications. Cases of the kind, therefore, it may be assumed, had occurred before, where the business was transacted through the state agent; but if not, still it is proved beyond all doubt that all the negotiations with the complainant were conducted by the sub-agent, and that all the propositions to and from the company in respect to the loan in question were transmitted to the company through the same state agent.

Satisfactory abstracts and certificates having been forwarded, and the due execution and delivery of the bond and mortgage having been procured, nothing remained to be done to enable Copeland to carry his fraudulent scheme into effect, except to get an order for the money in such a form that he could convert the fund to his own use, without danger of immediate exposure and detection. Antecedent conversations between the parties made it known to him that the complainant expected to receive the proceeds in drafts payable to his own order, it appearing that the complainant had told him that he wanted the amount in two drafts, one for six thousand dollars and the other for four thousand dollars, each payable to his own order. Apprised of what the complainant desired, he doubtless thought it prudent to seem to conform to his expressed wish. Circumstances occasioned some delay, but Copeland finally informed the complainant that the papers had gone forward, and stated that notice that the papers were satisfactory might come any day, and suggested that the complainant might as well sign the blank order for the money, adding that he would "fill it out," and the witness testifies that he looked at the blank, and seeing that it contained the words "in drafts to the order of," he put his signature to it and placed it in the drawer of Copeland, and went home.

Taken as a whole the evidence satisfies the court, beyond all doubt, that the blank form which the complainant signed was without date, except the year, which was in printed figures; that it contained no direction except the printed word "To," followed by a blank; that it did not contain the name of any payee nor anything upon the subject, except the printed words "Pay to," followed by a blank; that it did not specify any amount, nor contain anything upon the subject, except the printed word "dollars," preceded by a blank; that it did not specify for what the payment was to be made, nor did it contain anything upon the subject, except the printed words "on account of," followed by a blank; and that it contained nothing in respect to the medium of payment, except the printed words "in drafts to the order of," the word "of" immediately preceding the name of the plaintiff, H. G. Angle, and so close to the first initial of the signature as to leave no blank between the erased sentence and the name of the complainant.

Subsequent to the time when the blank form was signed by the complainant and was left in the drawer of Copeland, the printed words "drafts to the order of," just preceding the signature of the complainant, were erased, evidently with pen and ink, and the words "current funds" were inserted in writing between the printed word "in" and the word "drafts," which is the first word of the sentence "drafts to the order of," the effect of which was to authorize the company to pay the proceeds of the loan "in current funds," instead of "drafts to the order of" the signer of the blank form.

Armed with that instrument, the blanks having been filled and the words "current funds" having been inserted, in lieu of the words "drafts to the order of," which were erased, Copeland went to the home office and obtained the whole proceeds of the loan, and absconded with the whole amount.

Full power to receive the proceeds of the loan would have been conferred upon the person who presented it, even if the holder of the blank form had done nothing more than to fill the blanks, contained in the incomplete instrument; but it is quite obvious that if he had merely filled the blanks of the instrument, the company would have been obliged to make the payment "in drafts to the order of" the complainant, which, it is easy to see, would have defeated the fraudulent intent of the party who presented it for payment, as the drafts, if payable to the order of the complainant, could not be by that party converted into current funds. Had he merely filled the blanks, the body of the completed instrument would have read as follows, to wit: "Pay to [the person named] ten thousand dollars, on account of bond and mortgage, in drafts to the order of H. G. Angle." Evidently such an instrument would not have answered the purpose of the holder of the blank form, if he intended to betray his trust, and to convert the proceeds of the loan to his own use, without the consent of the lawful owner of the fund.

Blanks necessary to complete the instrument and render it operative, it may be admitted, might be filled by the holder of the instrument, but it is clear that it was not possible, within the meaning of that rule, to give the instrument such a form as would make it answer the supposed fraudulent intent, without doing violence to the scope and design of the blank form, as evidenced by the printed terms it contained, which, as outlines, plainly indicate that the signer required that the payment of the proceeds of the loan should be made in drafts to his own order. Manifest as that indication was, and as it would be even to the casual reader, it became necessary, in order to make the completed instrument answer the fraudulent intent of the holder, to change the scope and design of the same, which he effectually accomplished by erasing the printed words "drafts to the order of," which immediately preceded the name of the signer, as before explained, and by inserting the words "current funds" between the erased word "drafts" and the word "in," between which and the erased word "drafts" there was a short blank, scarcely sufficient to admit the written words "current funds," as will be seen by reference to the instrument actually presented to the company, which was sent up with the transcript as an original paper.

Compare the altered instrument with what it would have been if nothing had been done to it except to fill the blanks, and the criminal character of the act is manifest. By the erasure and insertion of the words "current funds" it was made to read as follows: "Pay to [the person named] ten thousand dollars, on account of bond and mortgage, in current funds."

Such an alteration, it is insisted by the complainant, is not and cannot be justified by any implication which arises from the existence of blanks in the instrument, inasmuch as the alteration consists both of the erasure of material words and the insertion of other material words in

lieu of those erased, which change the scope and legal effect of the instrument from what it would have been if the blanks had been filled without any such erasure and insertion.

Complainant concedes that blanks in such an instrument may be filled by the person to whom it is intrusted for use, but he contends that the said alterations made in the instrument in this case were a forgery, which renders the completed instrument void, and the court here concurs in that proposition.

Negotiable instruments are frequently delivered for use, with blanks not filled, and in respect to such instruments, it is held that where a party to such an instrument intrusts it to the custody of another for use, with blanks not filled up, whether it be to accommodate the person to whom it was intrusted, or to be used for the benefit of the signer of the same, such negotiable instrument carries on its face an implied authority to fill up the blanks necessary to perfect the same; and the rule is that, as between such party and innocent third parties, the person to whom the instrument was so intrusted must be deemed the agent of the party who committed the instrument to his custody, in filling the blanks necessary to perfect the instrument. *Violet v. Patton*, 5 Cran. 142; *Russell v. Langstaffe*, 2 Doug. 514; *Collis v. Emmet*, 1 H. Black. 313; *Montague v. Perkins*, 22 Eng. L. & Eq. 516.

Questions of the kind most frequently arise in respect to negotiable instruments, but the court here is of the opinion that the same rule is properly applicable to the case before the court. Authority to act for another may be express, or it may, in certain cases, be implied, but an implied authority has its limitations as well as that which is express. Examples to prove that proposition exist everywhere, but it would be difficult to give one more apposite and striking than the one presented by the case in decision, where the authority to fill blanks is implied from their existence in an instrument intrusted to another for use. 1 Greenl. Ev. (12th ed.) sec. 567.

Beyond all doubt such a party may fill every blank which it is necessary should be filled to perfect the instrument and render it operative within its scope and design, if the terms or words of the instrument sufficiently indicate what that scope and design are. Cases arise, it must be conceded, where a party signs his name to a blank paper and intrusts the paper containing his signature to another for use; but it is sufficient to say upon the subject, that the case before the court is not of that character. Instead of that the blank form signed by the complainant contained terms clearly indicating that the money was to be paid on account of "the bond and mortgage," and that the signer of the blank form required the payment to be made "in drafts to the order of" the signer of the same, and it was no more competent for the person to whom it was intrusted, in that state of the case, to erase the words "drafts to the order of," and to insert in the short blank preceding that sentence the words "current funds," than it would have been for that person to have prepared and executed a new instrument in the name of the signer, requesting the company to pay the proceeds to the order of the holder of the blank form.

Argument is scarcely necessary to support that proposition, as it is self-evident that the erasure of the words "drafts to the order of" changed

the manifest scope and design of the incomplete instrument; and it is equally clear that the words "current funds," which were inserted, are utterly repugnant to the printed terms "drafts to the order of," which were erased by black lines. *Bank v. Douglas*, 31 Conn. 180.

Properly applied that case is decisive of the present case. It appears that the defendant in that case put his name upon an inchoate bill of exchange, drawn and signed by the maker, on a certain firm, blanks being left for the date, amount, time of payment, and the name of the payee, and that the defendant delivered the paper, thus indorsed, to the maker of the same, who struck out the name of the place where it was made, and the name of the firm on which it was drawn, and filled out the instrument so as to make it a promissory note for three thousand five hundred dollars payable to the order of another party. Upon these facts the court held that an inference arose, which in favor of a *bona fide* holder of the paper was irresistible, that the person to whom the paper was intrusted was authorized, by filling the existing blanks, to complete the instrument and to fill the blanks, so as to bind the defendant as indorser of a bill of exchange, drawn by him on the firm therein named, for any sum, payable at any time and place. But, say the court, no inference or presumption of authority can arise that he might turn the bill drawn on one firm into a bill drawn on another, or to turn it into a promissory note. Neither dictum nor decision, say the court, has been cited to warrant such a claim, and they add that they suppose that none such can be found. Suit in that case was brought by the bank, claiming to be an innocent holder; but the court held that, notwithstanding the erasures, unmistakable evidence of the original character of the instrument remained, and that the evidence was amply sufficient to excite distrust and make it the duty of any one to whom the paper was offered to inquire when and by what authority such erasures and alterations had been made. *Gardner v. Walsh*, 32 Eng. L. & Eq. 162.

Where blanks exist in negotiable securities, delivered to another for use, the custody of the paper, under such circumstances, gives the custodian the right to fill the blanks, but it does not confer authority to make any addition to the terms of the note; and if any such, of a material character, are made by such a party, without the consent of the party from whom the paper was received, it will avoid the note, even in the hands of an innocent holder. *Ivory v. Michael*, 33 Missouri, 400.

Proof was given in that case that the parties had for many years been in the habit of indorsing for each other, that the defendant indorsed the note, which was in blank, as to the time of payment, and was payable without defalcation or discount. Before using it the other party filled the blank with thirty days, and added after the word discount, "bearing ten per cent. after maturity." Attempt was made in argument to sustain the right to make the addition to the note, because it was delivered before the blank was filled, but the court held that the insertion of the words, "bearing ten per cent. after maturity," was not the filling of a blank, and that it rendered the note invalid. *Wood v. Steele*, 6 Wall. 80.

Persons intrusted with negotiable securities for use by the parties to it may, if it contains blanks, fill the same; but Mr. Parsons, though he

admits that rule to its fullest extent, adds, that if one materially changes words which are printed or written, the note by such change would be rendered invalid; and certainly it must be so if the change substantially varies the scope of the instrument, to the prejudice of the party from whom it was obtained. 2 Pars. on Bills & Notes, 566.

Suppose that is so, still it is insisted by the respondents that the rule is not applicable in this case, because they had not notice of the defect in the blank order; but the court here is entirely of a different opinion. Even the holders of negotiable securities, taken in the usual course of business, before the securities fall due, are held chargeable with notice, where the marks on the instrument are of a character to apprise one to whom the same is offered of the alleged defect. *Goodman v. Simonds*, 20 How. 365.

When it is proposed to impeach the title of a holder for value, by proof of any facts and circumstances outside of the written instrument itself, it is a very different matter. He is then to be affected, if at all, by what has occurred between other parties; and he may well claim an exemption from any consequences flowing from their acts, unless it be first shown that he had *knowledge* of such facts and circumstances at the time the transfer was made. These principles are of universal application; but where a person takes a negotiable security which, upon the face of it, is dishonored, he cannot, says Taney, Ch. J., be allowed to claim the privileges which belong to a *bonâ fide* holder. *Andrews v. Pond*, 13 Pet. 65.

If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it; and the same doctrine was enforced and applied in a subsequent case, where, in speaking of a promissory note so marked as to show for whose benefit it was to be discounted, the court held that all those dealing in paper "with such marks on its face must be presumed to have *knowledge* of what it imported." *Fowler v. Brently*, 14 Pet. 318; *Browne v. Davis*, 3 Term, 80.

Actual notice in such a case is not required, even in suits founded upon negotiable securities, where the evidence of its infirmity consists of matters apparent on its face; nor is any different or stricter rule applicable in cases like the present, it appearing that the printed words, though erased, so as to be inoperative, were still entirely legible, even to the casual reader, and that the words "current funds" inserted before the erased word "drafts" were plainly repugnant to the erased words "drafts to the order of," which followed them in the same connection.

Constructive notice in such cases is held sufficient, upon the ground that when a party is about to perform an act which he has reason to believe may affect the rights of third persons, an inquiry as to the facts is a moral duty and diligence an act of justice. Whatever fairly puts a party upon inquiry in such a case is sufficient notice in equity, where the means of knowledge are at hand; and if the party, under such circumstances, omits to inquire and proceeds to do the act, he does so at his peril, as he is then chargeable with all the facts which by a proper inquiry he might have ascertained. *Hawley v. Cramer*, 4 Cow. 712; *Hill v. Simpson*, 7 Ves. Jr. 170; *Kennedy v. Green*, 3 Myl. & K. 722; *Booth v.*



*Barnum*, 9 Conn. 286; *Pitney v. Leonard*, 1 Paige, 461; *Pringle v. Phillips*, 5 Sand. 157.

Authorities to show that the material alteration of a written instrument renders it void are unnecessary, as it is a principle of universal application.

Decree reversed and the cause remanded, with direction to enter a decree in favor of the complainant.

## SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1875.]

### CONSTITUTIONAL LAW. — REGULATION OF COMMERCE. — TAXATION OF PASSENGERS BY STATE.

CHY LUNG v. FREEMAN *et al.*

1. The statute of California which is the subject of consideration in this case does not require a bond for every passenger, or commutation in money, as the statutes of New York and Louisiana do, but only for certain enumerated classes, among which are "lewd and debauched women." But the features of the statute are such as to show very clearly that the purpose is to extort money from a large class of passengers, or to prevent their immigration to California altogether.
2. The statute also operates directly on the passenger, for, unless the master or owner of the vessel gives an onerous bond for the future protection of the state against the support of the passenger, or pays such sum as the commissioner of immigration chooses to exact, he is not permitted to land from the vessel.
3. The powers which the commissioner is authorized to exercise under this statute are such as to bring the United States into conflict with foreign nations, and which can only belong to the federal government.
4. If the right of the states to pass statutes to protect themselves in regard to the criminal, the pauper, and the diseased foreigner landing within their borders exists at all, it is limited to such laws as are absolutely necessary for that purpose; and this mere police regulation cannot extend so far as to prevent or obstruct other classes of persons from the right to hold personal and commercial intercourse with the people of the United States.
5. The statute of California in this respect extends far beyond the necessity in which the right is founded, if it exists at all, and invades the right of Congress to regulate commerce with foreign nations, and is, therefore, void.

IN error to the supreme court of the State of California.

Mr. Justice MILLER delivered the opinion of the court.

While this case presents for our consideration the same class of state statutes considered in the cases just disposed of, it differs from them in two very important points.

These are, first: the plaintiff in error was a passenger on a vessel from China, being a subject of the Emperor of China, and is held a prisoner because the owner or master of the vessel who brought her over refused to give a bond in the sum of five hundred dollars in gold, conditioned to indemnify all the counties, towns, and cities of California against liability for her support or maintenance for two years.

Secondly, the statute of California, unlike those of New York and Louisiana, does not require a bond for *all* passengers landing from a foreign country, but only for classes of passengers specifically described, among which are "lewd and debauched women," to which class it is alleged plaintiff belongs.

The plaintiff, with some twenty other women, on the arrival of the steamer Japan from China, was singled out by the commissioner of immigration, an officer of the State of California, as belonging to that class, and the master of the vessel required to give the bond prescribed by law before he permitted them to land. This he refused to do, and detained them on board. They sued out a writ of *habeas corpus*, which, by regular proceedings, resulted in their committal, by order of the supreme court of the state, to the custody of the sheriff of the county and city of San Francisco, to await the return of the Japan, which had left the port pending the progress of the case, — the order being to remand them to that vessel on her return, to be removed from the state.

All of plaintiff's companions were released from the custody of the sheriff on a writ of *habeas corpus* issued by Mr. Justice Field of this court. But plaintiff, by a writ of error, brings the judgment of the supreme court of California to this court, as we suppose, for the purpose of testing the constitutionality of the act under which she is held a prisoner. We regret very much, that while the attorney general of the United States has deemed the matter of such importance as to argue it in person, there has been no argument in behalf of the State of California, the commissioner of immigration, or the sheriff of San Francisco, in support of the authority by which plaintiff is held a prisoner, nor have we been furnished even with a brief in support of the statute of that state.

It is a most extraordinary statute. It provides that the commissioner of immigration is "to satisfy himself whether or not any passenger who shall arrive in the state by vessels from any foreign port or place (who is not a citizen of the United States) is lunatic, idiotic, deaf, dumb, blind, crippled, or infirm, and is not accompanied by relatives who are able to support him, or is likely to become a public charge, or has been a pauper in any other country, or is from sickness or disease, existing either at the time of sailing from the port of departure or at the time of his arrival in the state, a public charge, or likely soon to become so, or is a convicted criminal, or a lewd or debauched woman;" and no such person shall be permitted to land from the vessel, unless the master or owner or consignee shall give a separate bond in each case, conditioned to save harmless every county, city, and town of the state against any expense incurred for the relief, support, or care of such person, for two years thereafter.

The commissioner is authorized to charge the sum of seventy-five cents for every examination of a passenger made by him, which sum he may collect of the master, owner, or consignee, or of the vessel by attachment. The bonds are to be prepared by the commissioner, and two sureties are required to each bond, and for preparing the bond the commissioner is allowed to charge and collect a fee of three dollars, and for each oath administered to a surety, concerning his sufficiency as such, he may charge

one dollar. It is expressly provided that there shall be a separate bond for each passenger, that there shall be two sureties on each bond, and that the same sureties must not be on more than one bond, and they must, in all cases be residents of the state.

If the ship-master or owner prefers, he may commute for these bonds by paying such a sum of money as the commissioner may in each case think proper to exact, and after retaining twenty per cent. of the commutation money for his services, the commissioner is required once a month to deposit the balance with the treasurer of the state. See chapter I. article VII. of the Political Code of California, as modified by section 70 of the amendments of 1873-4.

It is hardly possible to conceive a statute more skilfully framed to place in the hands of a single man the power to prevent entirely vessels engaged in a foreign trade, say with China, from carrying passengers, or to compel them to submit to systematic extortion of the grossest kind.

The commissioner has but to go aboard a vessel filled with passengers ignorant of our language and our laws, and without trial or hearing or evidence, but from the external appearance of persons with whose former habits he is unfamiliar, he points with his finger to twenty, as in this case, or a hundred if he chooses, and says to the master: These are idiots, these are paupers, these are convicted criminals, and these are lewd women, and these others are debauched women. I have here an hundred blank forms of bonds, printed. I require you to fill me up and sign each of these for \$500 in gold, and that you furnish me two hundred different men, residents of this state, and of sufficient means, as sureties on these bonds. I charge you five dollars in each case for preparing the bond and swearing your sureties, and I charge you seventy-five cents each for examining these passengers, and all others you have on board. If you don't do this you are forbidden to land your passengers under a heavy penalty.

But I have the power to commute with you for all this for any sum I may choose to take in cash. I am open to an offer, but you must remember that twenty per cent. of all I can get out of you goes into my own pocket, and the remainder into the treasury of California.

If, as we have endeavored to show in the opinion in the preceding cases, we are at liberty to look to the effect of a statute for the test of its constitutionality, the argument need go no further.

But we have thus far only considered the effect of the statute on the owner of the vessel.

As regards the passengers, section 2968 declares that consuls, ministers, agents, or other public functionaries of any foreign government, arriving in this state in their *official capacity*, are exempt from the provisions of this chapter.

All other passengers are subject to the order of the commissioner of immigration.

Individual foreigners, however distinguished at home for their social, their literary, or their political character, are helpless in the presence of this potent commissioner. Such a person may offer to furnish any amount of surety on his own bond, or deposit any sum of money, but the law of California takes no note of him. It is the master, owner, or consignee

of the vessel alone whose bond can be accepted. And so a silly, an obstinate, or a wicked commissioner, may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend.

While the occurrence of the hypothetical case just stated may be highly improbable, we venture the assertion that if citizens of our own government were treated by any foreign nation as subjects of the Emperor of China have been actually treated under this law, no administration could withstand the call for a demand on such government for redress.

Or, if this plaintiff and her twenty companions had been subjects of the Queen of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim for redress? Upon whom would such a claim be made? Not upon the State of California, for by our Constitution she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it, or the federal government? If that government has forbidden the states to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the states to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the states the acts for which it is held responsible?

The Constitution of the United States is no such instrument. The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress and not to the states. It has the power to regulate commerce with foreign nations; the responsibility for the character of those regulations and the manner of their execution belongs solely to the national government. If it be otherwise, a single state can at her pleasure embroil us in disastrous quarrels with other nations.

We are not called upon by this statute to decide for or against the right of a state, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad, nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity. When a state statute, limited to provisions necessary and appropriate to that object alone, shall in a proper controversy come before us, it will be time enough to decide that question. The statute of California goes so far beyond what is necessary or even appropriate for this purpose, as to be wholly without any sound definition of the right under which it is supposed to be justified. Its manifest purpose, as we have already said, is not to obtain indemnity, but money.

The amount to be taken is left in every case to the discretion of an officer, whose cupidity is stimulated by a reward of one fifth of all he can obtain.

The money when paid does not go to any fund for the benefit of immigrants, but is paid into the general treasury of the state and devoted to the use of all her indigent citizens. The blind, or the deaf, or the dumb passenger is subject to contribution, whether he be a rich man or a pauper. The patriot seeking our shores, after an unsuccessful struggle against despotism in Europe or Asia, may be kept out because there his resistance has been adjudged a crime. The woman whose error has been repaired by a happy marriage and numerous children, and whose loving husband brings her with his wealth to a new home, may be told she must pay a round sum before she can land, because it is alleged that she was debauched by her husband before marriage. Whether a young woman's manners are such as to justify the commissioner in calling her lewd may be made to depend on the sum she will pay for the privilege of landing in San Francisco.

It is idle to pursue the criticism. In any view which we can take of this statute it is in conflict with the Constitution of the United States, and, therefore, void.

The judgment of the supreme court of California is reversed, and the case remanded to that court with directions to make an order discharging the prisoner from custody.

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## SUPREME COURT OF MICHIGAN.

[APRIL, 1876.]

### PHOTOGRAPHIC COPIES AS EVIDENCE. — EVIDENCE IN THE JURY ROOM. — JUROR'S OATH.

#### IN THE MATTER OF THE WILL OF ALFRED FOSTER.

Photographic copies of manuscript are only secondary evidence like any copies, and it is not error to exclude them from the consideration of the jury, where the original is at hand.

Generally speaking, it is not error to refuse to require a jury, when they do not ask for it, to take to their jury-room a will that is in suit before them, for the purpose of comparing the body of the document with the signature, to see if it is not vitiated by forgery. Such comparison would involve matters of opinion, and would put individual jurymen in the position of expert witnesses to handwriting, and that, too, in the jury-room, whereas all evidence must be given in open court.

A juror violates his oath in coming to an opinion on statements of fact, not in evidence, but made to him by his fellow-juror in the jury-room.

CAMPBELL, J., delivered the opinion of the court.

Upon the appellate probate proceedings in the circuit court of Oakland County, certain rulings were made on the trial which are brought up by writ of error in the bill of exceptions. All relate to questions connected with the evidence used on the hearing.

The propounders of the will proved its execution by the two subscrib-

ing witnesses whose testimony was direct and positive to all the requisites of a valid will.

Upon opening their proofs the contestants proposed to furnish the jury with photographic copies of the will, which the court declined to permit.

A witness named Toms who was called to testify concerning Foster's handwriting, having produced a note and mortgage which he asserted to have been signed by Foster, the court refused, upon application, to allow these papers to be used before the jury for purposes of comparison.

A second application was refused, which proposed to give the jury photographic copies for purposes of comparison.

Permission to have the jury take the original will to their room to compare its body with the signature was also refused, no application having been made by the jury, and the opposite counsel not assenting unless the jury desired to see it.

These were the bases of the assignments of error.

If the court had permitted photographic copies of the will to be given to the jury, with such precautions as to secure their identity and correctness, it might not perhaps have been error. Nevertheless it is not always true that every photographic copy would be safe on any inquiry requiring minute accuracy. Few copies can be so satisfactory as a good photograph. But all artists are not competent to make such pictures on a large scale, and all photographs are not absolutely faithful resemblances. It is quite possible to tamper with them, and an impression which is at all blurred would be very apt to mislead on questions of handwriting, where forgery is claimed. Whether it would or would not be permissible to allow such documents to be used, their use can never be compulsory. The original, and not the copy, is what the jury must act upon, and no device can properly be allowed to supersede it. Copies of any kind are merely secondary evidence, and in this case they were intended to be used as equivalent to primary evidence in determining the genuineness of the primary document. That, and that only was in controversy, and was in court to be shown to the jury. However fortunate it may be that copies can now be produced which will closely resemble originals, it would be an unauthorized assumption to hold that courts should be compelled to receive additional and supplementary proofs which were neither necessary nor admissible before, and which are at best merely convenient aids to enable juries to dispense with the use of the primary evidence. Their rejection left the only paper before the jury with which they were at all concerned, and it was not error. The same remark will apply concerning the use of such copies during the examination of witnesses and the argument of counsel.

The refusal to require the original will to be taken to the jury-room, when the jury had not desired it, was not contrary to law or practice. It has even been questioned whether it could properly be allowed at all; but this seems to be rather disfavored than absolutely erroneous. Much may be said on both sides of such a question. But the purpose avowed in this cause of having the jury use the document to look for resemblances between the body and the signature, for the purpose of inferring forgery, indicates some danger in permitting it. When a juror is to give testi-

mony he must do it in open court. Yet practically this jury-room inquest would involve the expressions of opinions belonging somewhat to the domain of expert evidence, and having the force of facts, when if it were assumed the jury was competent to settle such matters by their own skill, it might not be competent to examine witnesses upon it at all. Nothing can be more dangerous than to allow the suspicions and surmises of men whose opinions could not often be received as witnesses, to fix the rights of parties by their fanciful notions of resemblances or differences. In this country most jurors are not illiterate, but it would be very strange if the average members of juries could be regarded as qualified to form safe opinions on an inspection of papers upon nice points of identity in handwriting, especially when the whole case may depend upon their correctness. Juries can undoubtedly, and must use their judgment more or less concerning documents laid before them, and have it in their power to rely on their own views very much if they see fit. But the law presumes they will act on testimony chiefly, if not entirely, and it would not be proper to assume that they all have equal knowledge or skill in such inquiries, or that when they consult together the opinions of one would not have more influence than those of another, when the opinions operate as facts in the cause. If a verdict were formed on statements of ordinary facts by one juror to his fellows it would be a violation of their oaths. When opinions are such as to stand in the same light, the result cannot be much less dangerous. No harm can usually result from the possession of documents in the jury-room, because they seldom call for examinations of their genuineness, and are usually only important for their contents. When their genuineness is in controversy, and that is to be judged by resemblances and peculiarities on which witnesses have been examined as experts, their inspection alone may become one of the means of evidence requiring skill to deduce its results.

Every one knows how very unsafe it is to rely upon any one's opinions concerning the niceties of penmanship. The introduction of professional experts has only added to the mischief instead of palliating it, and the results of litigation have shown that these are often the merest pretenders to knowledge, whose notions are pure speculation. Opinions are necessarily received, and may be valuable, but at best this kind of testimony is a necessary evil. Those who have had personal acquaintance with the handwriting of a person are not always reliable in their views; and single signatures, apart from some known surroundings, are not always recognized by the one who made them. Every degree of removal beyond personal knowledge into the domain of what is sometimes called, with great liberality, scientific opinion, is a step towards greater uncertainty, and the science which is so generally diffused is of very moderate value. Subject to cross-examination it may be reduced to the minimum of danger. In a jury-room, without any check or corrective, it would be very dangerous indeed.

The question of allowing papers not otherwise in the case to be received and proved for purposes of comparison was disposed of in *Vinton v. Peck*, 14 Mich. 287, and we have seen no reason to change our opinion. In the cases of the *Tracy & Fitzwater Peerages*, in 10 Clark & Finnelly, 154 and 192, this subject was discussed somewhat, and the danger of allowing tes-

timony of handwriting from studies made expressly for the occasion was forcibly expressed. Mr. Best regards it as absolutely incompetent, and it has been so regarded in some instances by the courts. Best on *The Stirling Peerage Case* was a remarkable illustration of its quality. Evidence, 236. Such testimony is usually not only obtained for the occasion, but obtained under bias. It was held in *Vinton v. Peck* that such testimony might be based on papers in the cause, although its value may not be very great. But when to the danger of hasty, and perhaps biased opinions is added the disputed genuineness of paper produced, and the difficulty of producing all that might be of use for comparison on both sides, we cannot but think the risk is too great to justify the reception of such means of proof. The fact that an English statute has allowed the reception of documents satisfactory to the court is not an argument to which we can yield our own judgment. Some of the ablest judges in England, who were not in the least backward in legal reform, have always regarded the old rule as rather over-liberal than over-strict. What influences may have induced Parliament to change the rule we do not know, but it certainly was not the opinion of those judges whose views have been most respected.

We think there is no error in the record, and the *judgment must be affirmed with costs.*

## SUPREME COURT OF OHIO.

(To appear in 27 Ohio St.)

CRIMINAL LAW. — HOMICIDE. — SELF-DEFENCE. — REPUTATION. — ASSAULT AND BATTERY.

### MARTS v. THE STATE.

1. On the trial of an indictment for murder, the prisoner may, for the purpose of showing that the homicide was justifiable on the ground of self-defence, prove that the deceased was a person of violent, vicious, and dangerous character, and that that character was known to the prisoner at the time of the rencontre between them.
2. Homicide is justifiable on the ground of self-defence, where the slayer, in the careful and proper use of his faculties, *bonâ fide* believes, and has reasonable ground to believe, that he is in imminent danger of death or great bodily harm, and that his only means of escape from such danger will be by taking the life of his assailant, although, in *fact*, he is mistaken as to the existence or imminence of the danger.
3. Where the plaintiff examines a witness in chief, who merely testifies to matters which are not controverted by the defendant or his witnesses, and after the close of defendant's testimony the same witness, upon being recalled by the plaintiff as a rebutting witness, contradicts the testimony of the defendant and his witnesses, the defendant has a right then to prove the bad reputation of the witness for truth and veracity.
4. On the trial of an indictment for murder it is competent for the jury, where the evidence justifies it, to find the defendant guilty of an assault and battery only, and it is error to the prejudice of the defendant to instruct the jury otherwise.

ERROR to the common pleas of Logan County.

Marts was tried at the November term, 1874, on an indictment for mur-



der, and was convicted of manslaughter and sentenced to the penitentiary. The only defence set up on the trial was, that the homicide was justifiable under the law of self-defence. The evidence tended to show that death was caused by a stone thrown from the hand of the prisoner; and there was also evidence tending to show that at the time the stone was thrown the deceased was armed with a pistol, and in the act of drawing the same, threatening that he would "fix" the prisoner. The evidence also showed that the deceased had previously threatened the prisoner's life, and that the prisoner had knowledge of that fact. For the purpose of further showing the imminence of prisoner's danger, and that his act was justifiable on the ground of self-defence, his counsel offered to prove that the deceased was a man of violent, vicious, and dangerous character, and that the prisoner, at the time of the rencontre, had knowledge of the fact. This evidence the court rejected, and the prisoner's counsel excepted to the ruling of the court.

The record also shows that, after the defence had closed its testimony, the state recalled one of its witnesses, who had been examined in chief, but who had testified to nothing that was disputed or denied by the prisoner or his witnesses, and by this witness contradicted material parts of the testimony of the prisoner and his witnesses. The prisoner's counsel thereupon offered testimony to prove the bad character of the witness for truth and veracity. But the court rejected the evidence, on the ground that it came too late. This ruling of the court was also excepted to by the counsel for the prisoner.

After the evidence had closed, the prisoner's counsel asked the court to instruct the jury as follows:—

"If Marts procured the stone he threw only for purposes of lawful self-defence, and if Brooks was armed with a deadly weapon and was turning to attack him, and if an attempt to flee by Marts would endanger his life, and he believed and knew all this in good faith, and if Marts threw the stone in good faith, believing it was the only mode by which he could avoid great bodily harm, then his act was not unlawful, and he could not be convicted of manslaughter."

The court refused so to charge, but did charge as follows:—

"If you are satisfied, from the testimony, that the defendant had good cause to fear death or great bodily harm from the deceased, and the danger was imminent,—so much so that retreat would increase the danger,—this act would be excusable. You will look to the evidence, and see whether there was danger. The palpable fact must exist that there was danger; and the fact that the defendant *believed* he was in danger of great bodily harm will not excuse him, unless in fact he was in danger of such bodily harm."

The prisoner's counsel also asked the court to instruct the jury, that if in their opinion the evidence warranted it, they might bring in a verdict for assault and battery only. The court refused to give this instruction, and said to the jury that if they failed to find the prisoner guilty of murder or manslaughter, they should return a verdict of not guilty generally.

In these several rulings of the court, and in others which need not be specified, it is now claimed that the court erred.

*William Lawrence & Joseph H. Lawrence*, for the plaintiffs in error.

I. If Marts threw the stone against his assailant, then armed with a deadly weapon, in good faith believing it was the only mode by which he could avoid great bodily harm, his act was not unlawful and the court erred in refusing to so charge. *Stewart v. State*, 1 Ohio St. 72; 2 Moak's English Rep. 163.

1 Bishop Criminal Law (5th ed.), sec. 303, collects the authorities: Wayland Moral Science, 81; *Reg. v. Thurborn*, 1 Den. C. C. 887; 1 Alison Crim. Law, 565; 1 Hume Crim. Law (2d ed.), 449; *McDonald's case*, 1 Brown, 288; *The State v. Scott*, 4 Ired. 409; *Rex v. Scully*, 1 Car. & P. 319; *State v. Field*, 14 Maine, 244; *Grainger v. State*, 5 Yerg. 459; *State v. Rutherford*, 1 Hawks, 457; *State v. Roan*, 2 Dev. 58; *Rex v. Holloway*, 5 Car. & P. 524; 1 East P. C. 273-277; 1 Hale P. C. 42; Broom Leg. Max. (2d ed.) 200, 201; 1 Gab. Crim. Law, 13; *Oliver v. State*, 17 Ala. 587; *United States v. Wiltberger*, 3 Wash. C. C. 515; *State v. Shippey*, 10 Minn. 223; *State v. O'Connor*, 31 Mo. 389; *Yates v. People*, 32 N. R. 509; *Smaltz v. Commonwealth*, 3 Bush, 32; *Isham v. State*, 38 Ala. 213. *Contra*, majority of the court in *People v. Shorter*, 4 Barb. 460. And see *McDaniel v. State*, 8 Sm. & M. 401; *Fahnestock v. State*, 23 Ind. 231; *State v. Rutherford*, 1 Hawks, 457; *State v. Scott*, 4 Ired. 409; *United States v. Wiltberger*, 3 Wash. C. C. 515; *Shorter v. People*, 2 Comst. 193; *People v. Shorter*, 4 Barb. 460; *Oliver v. State*, 17 Ala. 587; *Carroll v. State*, 23 Ala. 28; *People v. Sullivan*, 3 Seld. 396; *Monroe v. State*, 5 Ga. 85. See *Grainger v. State*, 5 Yerg. 459; *State v. Clements*, 32 Maine, 279; *State v. Harris*, 1 Jones N. C. 190; 2 East P. C. 273; *People v. Austin*, 1 Parker, 154; *Meredith v. Commonwealth*, 18 B. Mon. 49; *Teal v. State*, 22 Ga. 75; *Keener v. State*, 18 Ga. 194; *McPherson v. State*, 22 Ga. 478; *Commonwealth v. Fox*, 7 Gray, 585; *Lingo v. State*, 29 Ga. 470; Parsons, C. J., in the Massachusetts court, charge to the grand jury in *Selfridge's case*, Whart. Hom. 417, 418; Llyod's report of the case, 7-160; *Logue v. Commonwealth*, 2 Wright (Penn.), 265, 268; *S. P. People v. Cole*, 4 Parker, 35; *Pond v. People*, 8 Mich. 150; *Schnier v. People*, 28 Ill. 17; *Maher v. People*, 24 Ill. 241; *Hopkinson v. People*, 18 Ill. 264; *Washington Territory v. Fisk*, 3 Am. Law Record (Nov. 1874), 303; *Coffman v. Commonwealth*, 4 Ib. 488.

II. Where a party assailed by an adversary armed with a deadly weapon, and under the sole influence and impulse of fright, brought on by the wrongful act of the assailant, without any formed purpose, inflicts a mortal injury on the assailant, the party so assailed is excused.

This the court refused to charge, and in this there is error. Broom Legal Maxims (2d ed.), 226, 232, 239, 275, 683, and note; Bishop Crim. Law (5th ed.), sec. 288, and note.

III. The defence had a right to prove that the deceased was a dangerous, violent, and vicious man, and that this was known to the accused.

The character of the attack may be proved. It is, in fact, a part of the *res gestæ*. Yet the character of the attacking party is equally so. It is a part of the information on which the party assailed judges of his danger and duty. 5 Ga. 85; *Dusenberry v. State*, 3 Stew. & Port. 308; *State v. Tackett*, 1 Hawks, 210; *Oliver v. State*, 17 Ala. 599; *Com. v. Seibert*, Wharton on Homicide, 227; *Wright v. State*, 9 Yerg. 342; *Franklin v.*

*State*, 29 Ala. 14; *Cotton v. State*, 81 Miss. (2 George) 504; *Pritchett v. State*, 22 Ala. 39; *State v. Hicks*, 6 Jones (Mo.), 588; *Payne v. Com.* 1 Met. (Ky.) 370.

IV. The jury should have been instructed that they might find the accused guilty of an assault and battery. 1 Chitty Crim. Law, 250, 638; *Stewart v. State*, 5 Ohio, 242; *Sharp v. State*, 19 Ohio, 379; 2 Campb. 84, 583; 1 Leach, 36, 88; 2 East P. C. 516-518; 2 Hale, 352; Hawkins, b. 2, c. 47, secs. 4-6; 1 Burr. 399; *Hudson v. State*, 1 Blackford, 318; *Durham v. State*, 1 Blackford, 33; *Morris v. State*, 1 Blackford, 37; *State v. McCoy*, 2 Aiken (Vt.), 181; Roscoe Dig. Crim. Ev. 74; 1 Stark. Ev. (5th Am. ed.) 418; *State v. Burt*, 25 Vt. (2 Deane) 373; *Foley v. State*, 9 Ind. 363; *State v. Bowling*, 10 Humph. 52. This was expressly decided in *State v. Steedman*, 7 Porter, 495; *Clark v. State*, 12 Ga. 350; 1 Bishop Crim. Procedure (2d ed.), sec. 478; 1 Wharton Crim. Law (5th ed.), secs. 383-385, 560-565, 617-627; *R. v. Mitchell*, 12 Eng. Law & Eq. 588; *Carpenter v. State*, 23 Ala. 84; *State v. Kennedy*, 7 Blackford, 233; *McBride v. State*, 2 Eng. (Ark.) 374; *Reynolds v. State*, 11 Texas, 120; *Com. v. Kirby*, 3 Cush. 577; *Earned v. Com.* 12 Met. 240; *Carpenter v. People*, 4 Scam. 197; *Gillespie v. State*, 9 Ind. 380; *Johnson v. State*, 14 Ga. 55; *Cameron v. State*, 8 Eng. (13 Ark.) 712.

V. The refusal to receive evidence of the bad character of the acting and *de facto* wife of the accused was a denial of justice. The offer to impeach was at the first moment when it became material and possible. Judicial discretion can never be allowed to defeat the ends of justice.

*Price & Martin*, also for the plaintiff in error. The court erred in excluding testimony as to the violent, vicious, and dangerous character of the deceased.

For the rule as to the admissibility of such testimony, see 1 Wharton Crim. Law, sec. 641, and cases there cited.

The court erred in its instructions to, and in its refusal to instruct the jury.

It seems to us a monstrous doctrine that if a man is misled concerning facts, without his own fault or carelessness, he is nevertheless criminally responsible if it should turn out that he was mistaken. To establish such a principle is to remove the foundation stone of all criminal jurisprudence, for "the doctrine of intent, as it prevails in the criminal law, is necessarily one of the foundation principles of public justice. There is only one criterion by which the guilt of men is to be tested. It is whether the mind is criminal," &c. 1 Bishop Crim. Law, sec. 287 (5th ed.).

For the rule, see 1 Bishop Crim. Law, secs. 303, 305 (5th ed.); and also see *Territory of Washington v. Fisk*, Am. Law Rec. for November, 1874; *Coffman v. Commonwealth*, Am. Law Rec. for Jan. 1875; Wharton on Homicide, 418.

The decisions cited are so consonant with natural reason, that it is difficult to see why the doctrine has ever been doubted. They are in accordance with the maxim, "*Actus non facit reum, nisi mens sit rea.*"

*Duncan Dow & J. Duncan McLaughlin*, for the state.

WELCH, J. We think the court was wrong in its instructions to the jury as to the law of self-defence. Homicide is justifiable on the ground of self-defence, where the slayer, in the careful and proper use of his fac-

ulties, *bond fide* believes, and has reasonable ground to believe, that he is in imminent danger of death or great bodily harm, and that his only means of escape from such danger will be by taking the life of his assailant, although in *fact* he is mistaken as to the existence or imminence of the danger. The fact of the existence of such danger is not an indispensable requisite.

Such being the law of the case, it follows, we think, that the court erred in ruling out the evidence of the "violent, vicious, and dangerous character" of the deceased. That evidence, offered as it was in connection with proof that this character of deceased was known to defendant, was competent for the purpose of showing that the homicide was justifiable on the ground of self-defence. It tended to show the *quo animo* of the prisoner, and it was for the jury to determine its weight. It could only be used for that single purpose, and could not be considered or used for the purpose of disproving the homicide, or of showing that the prisoner was assaulted, attacked, or menaced by the deceased. It will be observed that the evidence so offered and rejected was not evidence of the *reputation* of the deceased, but evidence of his "character." We suppose that evidence of the *reputation* of the deceased as being a vicious, violent, or dangerous person, could only be given after the introduction of testimony tending to show that such was in fact his *character*, and then only for the purpose of proving that the prisoner had notice of that character. In other words, the dangerous *character* of the deceased cannot be proved by proof of his *reputation*; but notice of that character to the prisoner may be shown by proof of such reputation, in connection with proof that the prisoner had the means of knowing that reputation.

We are also of opinion that the court erred in rejecting the testimony offered to impeach the witness recalled by the state. As we understand the record, it was not until the witness was recalled that she testified to anything that was disputed, either by the defendant or any of his witnesses, and therefore he had no occasion to impeach her until after her re-examination. To hold that it was too late then to impeach her, would be to require him to impeach a witness whose testimony he believed to be true, or rather to deny him the right of impeachment altogether.

We hold also that the court should have instructed the jury, as requested, that it was competent for them, if, in their opinion, the evidence justified it, to find the defendant guilty of an assault and battery only, and that the refusal of the court to give such an instruction was error to the prejudice of the defendant. It is true that if death resulted from the unlawful assault and battery, the assailant was guilty of manslaughter; but the jury might have found that it resulted from some other cause. Had the court charged the jury, that if they found that the death resulted from the assault and battery, they could not properly find him guilty of assault and battery only, the charge would have been right.

Several other assignments of error are made upon the record; but we deem it unnecessary to notice them, further than to say that in our judgment they are not maintainable.

*Judgment reversed and cause remanded.*

McILVAINE, C. J., WHITE, REX, and GILMORE, JJ., concurred.

## SUPREME COURT OF MAINE.

(To appear in 65 Maine.)

## PROMISSORY NOTE — NEGLIGENT SIGNING OF.

## KELLOGG v. CURTIS.

1. The defendant, having voluntarily signed as maker a negotiable promissory note, supposing he was binding himself to some other contract, and relying on the representations of the payee as to the contents of the paper, without examining it sufficiently to ascertain the fact for himself, is estopped by his own negligence from setting up the invalidity of the note against a *bona fide* holder thereof.
2. Where there are no exigencies to be weighed, whether the admitted facts constitute negligence or not is a question of law and not of fact.

ON exceptions from the superior court.

Assumpsit on a promissory note of the tenor following: "Town of Bingham, county of Somerset, December 15, 1870. One year after date I promise to pay to the order of J. S. Newcomb two hundred dollars, value received, with use at the Second National Bank at Skowhegan." Signed, "I. W. Curtis," and indorsed, "J. S. Newcomb. For remittance to Agricultural National Bank, Pittsfield, Mass."

The defendant duly filed the following denial of signature: "I on oath say, that while the signature to the instrument produced as the one declared on appears to be my genuine signature, I never signed the note declared on knowing it to be a note, or having any reason to suppose it was a note."

This denial was ruled to be insufficient under the rule to require the plaintiff to prove the signature.

The plaintiff offered evidence tending to show that he was the *bona fide* holder of the note, for valuable consideration paid therefor before maturity, without notice of fraud in the making of the note, or of equities between the original parties thereto. The defendant offered evidence tending to show that the note was procured by the fraud of the payee, and that there was notice thereof to the plaintiff sufficient to put him upon inquiry before he purchased the note.

The following is the only testimony in regard to the manner in which the note was originally procured of the defendant by the payee.

The defendant testified: "I am a farmer; about December 15, 1870, Ira Brown drove into my door-yard and inquired the distance to Bingham; asked if I used a mowing machine; said he was around appointing agents to sell a patent sickle bar, as he called it; he drew out a model and put it in operation; I said I thought it was rather a good thing; he wanted me to accept the agency of the town; I declined; he insisted; and said, 'If you knew my proposals, perhaps you would take it;' they were to give the agent one half of the profits, and the price to sell for was ten dollars a pair; after a while I consented but did not agree to take any certain amount; he sat in his carriage, wrote what he called a commission to sell, and left it with me; he then asked questions as to my post-office address, the nearest express station, the nearest convenient bank, and kept writing

as he questioned and received answers; and then said, 'I want you to come and sign your name.' Said I, 'You can do it just as well as I.' Said he, 'I rather you would write it to show that it is correct.' He handed me the book. It was dark, and I use glasses. I held the book on my knee, wrote my name, and handed the book to him. He did not get out of his carriage. He was to send me a bundle of the sickle bar and a model. I received nothing from him. Brown pretended to be acting for Mr. Newcomb."

The presiding justice who tried the cause without the intervention of a jury, adjudged as follows: "Upon the foregoing testimony, which is uncontradicted, I find as matter of fact that the note in suit was procured of the defendant by the fraud of the payee, without knowledge on the part of the defendant of the character of the paper signed, and without negligence on the part of the defendant.

"I. And without deciding the contradicted question of fact, whether the plaintiff is a *bond fide* holder for value without notice and before maturity, I rule *pro formâ*, as matter of law, that a note so procured, without negligence on the part of the maker, is invalid even in the hands of an innocent third person who has obtained it in the manner claimed by the plaintiff.

"II. The testimony of Curtis, the maker of the note, in regard to the circumstances under which the note was given, was admitted subject to objection."

To the rulings in matters of law numbered one and two, the decision being for the defendant, the plaintiff excepted.

G. W. Verrill, for the plaintiff.

J. H. Drummond, for the defendant.

PETERS, J. The principal question in this case was substantially settled by the decision in *Abbott v. Rose*, 62 Maine, 194. It was there held, that a person who negligently signs and delivers to another a printed blank note, not knowing it to be such, but supposing it to be some other agreement, was liable thereon, if the blanks were afterwards wrongfully filled, and the note then transferred to a *bond fide* holder for value, without notice of the fraud. In this case, instead of an unfinished written promise, the paper executed by the defendant is a completed negotiable note. Although obtained from the defendant by circumvention and fraud, we think he is liable thereon to an innocent holder of the note. We are aware that there are many cases in the different states, where the tendency of the decisions may be the other way. The authorities are conflicting. But in consideration of the importance that attaches, in a commercial community, to a free and safe circulation of negotiable paper, and taking into account the temptations which impel men to resort to evasion and falsehood to avoid negotiable obligations given by them in speculations which result in loss and disaster, we are satisfied that our view of the law upon this question is most in accordance with the principles of justice and equity to all parties concerned. It is admitted, in all the cases where a different policy or doctrine is accepted, that a liability may exist, if there is any fault or negligence on the part of the maker of such note. In our opinion, the facts of this case clearly show a heedlessness by the defendant and want of care. We by no means mean to be understood as

saying that a person may be holden in every case where his signature to a note has been surreptitiously obtained. Many cases might occur where the maker would be in no fault. But the defendant signed a paper which he knew was to be effectual for some purpose by means of his name thereto, and was in fault for intrusting it with an adversely interested party, without knowing himself what it was. By this act he inflicts a loss upon an innocent party unless he bears the loss himself. We think he should bear the penalty of his own folly and mistake. *Caveat emptor* does not apply in such a case.

It is contended that the defendant is not liable, because the obtaining the note from him in the manner in which it was done was an act of forgery, and not merely a fraud. In *Foster v. McKinnon*, 4 Law R. C. P. 704, much quoted in cases, it is said that the maker of such a note "never intended to sign, and therefore, in contemplation of law, never did sign the contract to which his name is appended; . . . that his mind never went with the act." It might be forgery as far as the original parties to the note are concerned, or in a criminal prosecution of the offender, as virtually settled in *State v. Shurtleff*, 18 Maine, 368. But the answer to this objection is, that in a suit by an innocent holder the maker is estopped by his own fault and negligence from setting up a defence of forgery. *Abbott v. Rose*, *supra*; *Van Duzer v. Howe*, 21 N. Y. 531. The principle is clearly and correctly enunciated in a late case in Missouri, not yet reported, thus: "Where it appears that the party sought to be charged intended to bind himself by some obligation in writing, and voluntarily signed his name to what he supposed to be the obligation he intended to execute, having full and unrestricted means of ascertaining the true character of such instrument before signing it, but neglecting to avail himself of such means of information, and relying on the representations of another as to the contents of the instrument, signed and delivered a negotiable promissory note, instead of the instrument he intended to sign, he cannot be heard to impeach its validity in the hands of a *bond fide* holder." Am. L. Reg., Sept. 1875, 480. See, also, *Nebeker v. Cutsinger*, 48 Ind. 14.

It is, however, further contended that the defendant is not liable, because the judge presiding found as a matter of fact that the note was given by the defendant without negligence on his part. But it was an error on the part of the judge to make such finding. What constitutes negligence in a case like this, where the facts are clear and unequivocal, is a question of law. The testimony of the defendant is uncontradicted. No fact is in doubt or dispute; no question about motive or intent to be judged of. There are no attendant circumstances or exigencies to be weighed or considered, affecting the rights of the parties. The whole evidence, with all possible inferences which can be legitimately based upon it, cannot exculpate the defendant from the negligence imputed to him. Therefore it was not competent for the judge to make the deduction upon the facts that he did make. The point was one of law, and not of fact; and wrongly decided. The conclusion is well sustained by the authorities: *Gilbert v. Woodbury*, 22 Maine, 246; *Davis v. Greene*, *Ib.* 254; *Todd v. Whitney*, 27 Maine, 480; *Sawyer v. Nichols*, 40 Maine, 212;

*Lane v. O. C. & F. R. R. Co.* 14 Gray, 148; *Gavett v. M. & L. R. Co.* 16 Gray, 501; *Gahagan v. B. & L. R. Co.* 1 Allen, 187.

*Exceptions sustained; new trial granted.*

APPLETON, C. J., WALTON, DICKERSON, BARBOWS, and VIRGIN, JJ., concurring.

## SUPREME COURT OF MICHIGAN.

[APRIL, 1876.]

### CONSTRUCTION OF GUARANTY.

#### LOCKE v. McVEAN.

Though a guaranty should ordinarily be construed according to its import, like other instruments, the guarantor cannot be held to an interpretation materially different from the explicit wording; as, for example, to secure the payment of notes running six months, where he had made himself responsible for notes due in four; nor where the rate of interest is increased.

GRAVES, J., delivered the opinion of the court.

Locke and defendant in error, David McVean, entered into an agreement in writing on the first of March, 1871, of the following tenor:

"It is agreed that all sales of sewing machines which O. M. Locke, of Detroit, Mich., shall make to David McVean, of Lapeer, shall be upon the terms and conditions following, unless it shall be otherwise in writing hereafter agreed during the continuance of this contract. All indebtedness by *account*, *NOTE*, or otherwise, which shall arise under this contract from said D. McVean to said O. M. Locke, shall be paid when due.

"First. Machines will be packed for transportation and delivered in Detroit by O. M. Locke, after which all expenses of every kind will be paid by said David McVean.

"Second. Said David McVean shall reasonably advertise and make all reasonable efforts to sell at prices not less than the regular retail prices of O. M. Locke, and shall introduce, supply, and sell said machines as speedily, thoroughly, and extensively as practicable, throughout said Lapeer County, State of Michigan.

"Third. Said D. McVean shall neither keep nor deal in any other sewing machines than the 'Florence,' and shall supply himself by purchase from O. M. Locke with needles, threads, and findings for said machines, that his customers and the community may be at all times promptly and conveniently supplied; and said needles, thread, and findings shall be sold to him by O. M. Locke, at the *lowest wholesale price to such agents for cash*.

"Fourth. O. M. Locke will, during the continuance of this agency, *sell his machines to said D. McVean at a discount of 25 per cent. from the regular retail prices at Detroit.*

"Fifth. Said D. McVean shall give to every purchaser of a Florence



machine full and thorough instructions how to run said machine, and shall forfeit to O. M. Locke all profit or commission on such sale, in case of failure or neglect to fulfil the requirements of this clause.

"Sixth. So long as said D. McVean shall conduct this business properly, energetically, and to the satisfaction of O. M. Locke, no other local agent for the sale of said sewing machines will be established in said territory.

"Seventh. *Said D. McVean shall give his note of hand for all purchases of machines at the time of purchase. Said notes to be on four months' time, without interest. If so desired, an extension of time will be granted by O. M. Locke, equal to sixty days on each note. Said McVean to pay interest therefor at the rate of 8 per cent. per annum. O. M. Locke agrees to take good notes that said McVean may receive in exchange for machines, provided said notes are payable at bank or express office, bearing interest from date, on not over six months' time, and indorsed by D. McVean. If not paid at maturity, said notes are to be returned to said D. McVean. If O. M. Locke shall not be satisfied with the conduct of said business and agency by said D. McVean, he may establish another agent in his stead at pleasure. Said D. McVean may discontinue this agency at pleasure, on notice of thirty days.*

"For the more convenient prosecution of this agency, O. M. Locke agrees to furnish said McVean with a wagon as soon as said McVean shall become satisfied that the territory will pay sufficiently well to justify the expense. Said wagon to be the property of O. M. Locke, and to be returned in as good order as received, 'natural wear excepted,' upon demand of O. M. Locke."

At the time this contract was entered into, a bond was written and executed on the back of it from the defendant David McVean, as principal, and the defendant Daniel McVean and one Alexander McVean, now deceased, as sureties, to the plaintiff Locke, in the penal sum of two thousand dollars, and conditioned that if David McVean should "well and truly keep and perform, in all respects according to its true intent and meaning," the contract in question, then the obligation should be void; otherwise, in force.

Subsequently David McVean gave his five several promissory notes to Locke, each payable six months after date, and dated respectively May 17, May 18, September 22, October 2, and October 7, in the year 1871, and each, except the second, only drawing interest after four months, and then at the rate of eight per cent. The second was so worded as upon its face to draw interest at seven per cent. from date for the first four months, and thereafter at eight. The notes were all given for sewing machines furnished by Locke in the course of the business explained in the contract, and not being paid, Locke sued upon the bond to enforce collection of the surviving surety. When the case came on for trial, there was no dispute about the genuineness of the papers. The only question was whether the bond applied to and covered these notes. The contract and bond were admitted in evidence without objection, but the surety insisted that the notes were not such as he agreed to be liable for; that he only bound himself to be liable for notes given by David McVean to the plaintiff, and drawn payable at four months, whereas the notes offered were

drawn payable at six months ; and the judge sustained the objection, and refused to admit the notes in evidence. The question in the case is upon the correctness of this ruling, and it turns upon the interpretation of the papers. In argument, counsel laid down conflicting rules as to the interpretation of guaranties. For the defendants it was contended that the undertaking of the guarantor must be read and applied according to the strict letter or precise terms used to express it, and *Wright v. Johnson*, 8 Wend. 576, and several other cases were cited. On the part of plaintiff in error it was claimed that the same principle is to govern which obtains when other contracts are in question, and that the intent of the parties is to be sought for and may be gathered from the whole instrument and the subject matter of the engagement. And *Curtis v. Hubbard*, 6 Met. 191, and *Lee v. Dick*, 10 Pet. 493, were referred to.

Formerly, it is certain there was much diversity of opinion on this subject. A number of New York cases were very strongly on the side of construction favorable to the guarantor, and such as would reduce his liability within the narrowest limits. Chancellor Kent seems to have inclined to that doctrine. Com. vol. 3, p. 124. There were likewise some English authorities which favored the same view. But in *Mason v. Pritchard*, 12 East, 227, the court of king's bench declared that the words were to be taken as *strongly against the guarantor* as the sense of them would admit of ; and in *Merle & others v. Wells*, 2 Campb. 413, Lord Ellenborough, at nisi prius, acted on the same principle. In *Hargreave v. Smea*, 6 Bingh. 244, Tindal, C. J., said : " The question is, what is the fair import to be collected from the language used in this guaranty ? The words employed are the words of the defendant (the guarantor) in this cause, and there is no reason for putting on a guaranty a construction different from that which the court puts on any other instrument. With regard to other instruments the rule is, that if the party executing them finds anything ambiguous in the expression, such ambiguity must be taken most strongly against himself." Park, J., observed that it had been conceded that all these cases were to be decided each on its own ground ; and that it was useless, therefore, to refer to the decision except for some principle incidentally laid down ; that the only question of principle which had been agitated was whether these instruments were to be construed strictly, and that he was not disposed to hold the doctrine which had been imputed to Lord Wynford, that a guaranty ought to receive a strict construction. Burrough, J., remarked that he hoped the time would come when more reliance would be placed on principles than on cases ; that he had no doubt as to the intention of the parties ; that the writings were commercial agreements, and ought to receive a liberal, not a strict construction. In *Wood v. Printner*, in the exchequer, in 1866, the chief baron observed, the question in these cases depends not merely on the words, but, when the words are at all ambiguous, requires a consideration of the circumstances to aid the construction ; that it was therefore necessary to look at the existing state of things, and looking to that, to construe the words in such a way as the court considered most consistent with the intention of the parties ; not, indeed, considering any statements of either party as to what he meant by the words used, but taking the words themselves, together with the surrounding facts, as the exponents

of the meaning of both. Martin, B., observed that he could not assent to the remark of Bailey, B., in *Nicholson v. Paget*, 1 Cr. & M. 52, that a contract of guaranty ought to be read in any peculiar way, and stated that his own opinion was, it should be read in the same way as any other contract.

Bramwell, B., also repudiated the opinion of Bailey, B., in *Nicholson v. Paget*, and thought a contract of guaranty should be interpreted in the same way as other contracts. Pigott, B., concurred, and the judgment followed the rule as stated (L. R. 2 Exch. 66), and was affirmed in the Exchq. Chamber, Ib. 282.

In *Burgess v. Eve* the vice-chancellor remarked that *reason* must be applied to the construction of an instrument of guaranty, and in view of the surrounding facts and the expressions he proceeded to ascertain the import of the engagement, by giving what he called a reasonable construction to the terms. L. R. 13 Eq. Cases 450; 2 Eng. 379. See also *Tanner v. Woolmer*, 20 E. L. & E. 491; *North Western R. W. Co. v. Whinray* 26 E. L. & E. 488; *Bainbridge v. Wade* 1 E. L. & E. 286; *Rolt v. Cozens*, 37 E. L. & E. 261; *Broom v. Batchelor*, Ib. 512; *Mayer v. Isaac*, 6 Mees & Wels. 605. In *Curtis & another v. Hubbard*, 6 Met. 186, Chief Justice Shaw observed that in construing an instrument of guaranty, as in the case of any other written instrument, the *intent* of the parties is to govern, as collected from the whole instrument and the subject matter to which it applies. In *Dobbin v. Bradley*, 17 Wend. 422, in *Gates v. McKee*, 8 Ker. 232, and in *Rindge v. Judson*, 24 N. Y. 64, the true rule was deemed to be, that when the question is as to the meaning of the written language in which a guarantor has contracted, there is no difference between the contract of a surety and that of any other party, and this seems to be the doctrine as now settled in New York. In the last case many authorities were cited and considered. The view now generally received appears to be, that for the purpose of finding out what the contract is, the same course is to be pursued that the law authorizes to ascertain what the parties have agreed upon in the case of other mercantile contracts; but that when an understanding is once reached of the true agreement, the rules and principles which pertain to the rights and duties of *principal* and *surety* apply, so far as appropriate to the form of that relation recognized in the case of *guarantor* and *guaranty*, or admissible in view of the nature and terms of the particular transaction.

This subject has been examined because counsel on both sides appeared to attach importance to it, but according to my impressions the decision of the present case does not depend upon the adoption or rejection of any particular rule which ambiguous agreements may be supposed to call for. When the stipulations are plain on their face, so far as they concern the matter in dispute, there is no occasion to spend time about rules. *Mayer v. Isaac*, *supra*. The explicit description of the undertaking of the party can speak for itself, and if the question is whether a particular matter equally specific is within it, there ought not to be great difficulty in deciding. As he who undertakes cannot be required to assume more than he promised, if the matter he is sought to be charged with is identically different in substance and effect, no nice reasoning is necessary to prove the want of liability of the promisor; and on the other hand, if

what is claimed is identically comprehended by the written description of the undertaking, there would seem to be no room for debate. The transaction here must be viewed as it would be if the contract between the plaintiff and David McVean had been copied into the preamble of the condition of the bond; and proceeding to read the bond in that way, and comparing the notes in question with the defendant's undertaking in the obligation, I discover no ambiguity and find nothing uncertain. The parties contemplated two forms of indebtedness, one by notes given for machines, and the other for needles, thread, and findings, for which notes were not expected to be given, and in the commencement of the agreement it was provided that David should pay such indebtedness when due. The notes there referred to were left to be described in a later provision, and in the seventh article we find them described. For every machine, David was to give at the *time of purchase* his note on four months' time without interest, and in case he desired, was to have an extension for sixty days, but for the time of the extension there was to be interest at the rate of eight per cent. Of course under the arrangement, Locke would be entitled to the specified note on parting with the machine. No other or different notes were provided to be given by David to the plaintiff, and under the contract the plaintiff could not require any other. They would be a specific form of indebtedness, and very distinguishable from one resting upon verbal proof. As notes they could be negotiated and used in business, and transferred so as to exclude objection or defence by the maker. The guaranty amounted to an obligation that such notes should be paid when due; but it was not an agreement that any notes which David might give to run six months or six years should be paid when due. It was of special interest to the guarantors that the time of running of the notes they were to be liable for should be fixed. If not fixed, then the time in each case would depend on the notions of the immediate parties, who might make it very short or extend it to years, and the guarantors would be always uncertain as to the length of time to which their liability might be carried. Every one must see the difference between becoming bound for all notes one neighbor may give another on whatever time, and becoming bound for all notes so given having four months to run. It is common experience that men will often become sureties on three or four months' paper, when they will not if the paper was drawn at six months. There are some definite circumstances which mark the difference in the risk, and there is always room for contingencies to enhance the risk.

But the main consideration is, the guarantors only undertook for paper of a specific description, — only because bound to stand responsible for four months' notes, — and the plaintiff and David had no power to extend the obligation to other securities.

The plaintiff's counsel contend, however, that in view of the clause for an extension on each four months' note for sixty days, the notes in question, though given for six months, were substantially for four months extended as authorized.

I do not think so. Each note was to run four months without interest, and in case of extension then to carry interest at eight per cent. per annum for the extended time.

As previously stated, the second note in question was intended to draw interest from its date for four months at seven per cent., and thereafter at eight.

Clearly this note was a great way from being the same as one drawn pursuant to the plan covered by the guaranty and then extended sixty days. A few figures will explain one marked difference in dollars and cents.

But a short computation and comparison will prove that neither of these notes, in regard to length of time or amount of interest, is in substance the same as if drawn for four months without interest and extended sixty days with interest at eight per cent. during that period. In every case the time and amount are both greater. Other distinctions may be noticed. The legal right to compel reception of payment and the surrender of the paper is postponed an additional two months, and that excess of time is likewise afforded for transfer before maturity, and these are substantial differences.

Indeed the variances are too marked to leave room for any serious question. *Russell v. Perkins*, 1 Mason, 368; *Birckhead v. Brown*, 5 Hill, 634; *North Western R. R. Co. v. Whinray*, 26 E. L. & Eq. 488; *Walrath v. Thompson*, 6 Hill, 540; *S. C. 2 Cow.* 185; *Skinner v. Valentine*, 59 N. Y. 473; *Hall v. Rand*, 8 Conn. 560; *Eames v. Carlisle*, 4 N. H. 201.

*The judgment should be affirmed with costs.*

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## SUPREME COURT OF OHIO.

(To appear in 26 Ohio State.)

NATIONAL BANK. — POWERS OF, TO DISCOUNT PAPER, ETC. — USURY.

### SMITH v. THE EXCHANGE BANK OF PITTSBURG.

In the business of banking, the purchasing and discounting of paper is only a mode of loaning money; and a national bank is authorized thus to acquire notes and bills which are perfect and available in the hands of the borrower, as well as his own paper made directly to the bank.

Where a note or bill is an existing security in the hands of the holder, the usury exacted by the bank in its acquisition is not available, by way of defence, to the antecedent parties. Their rights and liabilities are not affected by the usurious character of a transaction in which they did not participate.

The party with whom the bank had the usurious transaction is the party to whom, under the national banking act, the forfeiture of interest is to be adjudged; and who, in case the interest has been paid, is authorized to recover back twice the amount.

MOTION for leave to file a petition in error to reverse the judgment of the district court of Franklin County.

On the 17th day of October, 1874, the defendant in error commenced an action, in the court of common pleas of Franklin County, against Benjamin E. Smith, William Dennison, James M. McKee, Francis Collins,

D. T. Thompson, A. J. Ware, and C. R. Griggs, upon a bill of exchange of which the following is a copy, with the indorsements thereon:—

"\$6,000. Columbus, Ohio, March 5, 1874. Five months after date pay to the order of Harbaugh, Matthias & Owens six thousand dollars, at St. Nicholas National Bank, New York city, value received, and charge to account of B. E. Smith. To Thompson, Griggs & Co., Columbus, Ohio. Accepted: Thompson, Griggs & Co." Indorsed: "Pay order of Exchange National Bank of Pittsburg. Harbaugh, Matthias & Owens."

The petition in the action alleges, among other facts, that the bill was accepted in writing by said Thompson, Griggs & Co., on the 4th day of April, 1874, and was on that day indorsed and delivered for value to the defendant in error; that said Smith is liable on the bill as drawer, and all the defendants are liable thereon as acceptors; that on the day the bill became due no part thereof was paid, although then presented to said Thompson, Griggs & Co., at St. Nicholas National Bank, in New York, for payment, and protested—of all which said Smith had then due notice; that said St. Nicholas National Bank is situate in the State of New York, and the legal rate of interest therein is seven per centum per annum; that there is due from the defendants to the plaintiff the sum of \$6,000, with interest thereon, at the rate of seven per centum, from August 8, 1874, and \$2.49 costs of protest; and for all which the plaintiff prayed judgment.

On the 18th of November, 1874, two of the defendants—namely, Smith and Dennison—filed their answer. It sets up three grounds of defence:—

(1.) That the plaintiff is not entitled to recover interest upon the amount of said bill *at the rate of seven per cent. per annum* from August 8, 1874, on which day the bill became payable.

(2.) That on the 4th of April, 1874, the plaintiff in the action *purchased* said bill of said Harbaugh, Matthias & Owens, the payees thereof; and that by the provisions of the act of Congress to provide a national currency, the plaintiff had no authority to purchase said bill, and therefore has no legal right to maintain the action.

(3.) That the plaintiff has its place of business in the city of Pittsburg, Pennsylvania; that by the law of that state the rate of interest is six per cent. per annum, and by said act of Congress plaintiff is only entitled to charge interest at that rate upon its loans, discounts, &c.; but that in the purchase of said bill the plaintiff, as the defendants are informed and believe, and from such belief aver, charged and received interest at the rate of nine per cent. per annum, and that such act was illegal, usurious, and void, and the plaintiff has no legal right to maintain said action on said bill.

On the 1st of December, 1874, the plaintiff filed a demurrer to each ground of defence.

Afterward—to wit, December 21, 1874—the plaintiff moved the court to hear the issues of law raised by said demurrers, out of the order in which the cause had been placed on the trial docket. Smith and Dennison resisted the motion, and filed a paper styled an answer to the motion, in which they claimed that their legal counsel had not "prepared properly for the hearing and argument of said issues of law" at the term of the court then being holden, and asserted that the court could not

legally order the cause to be heard on the demurrers until it was regularly reached on the docket.

The motion was sustained, and the cause heard upon said demurrers, and taken under advisement by the court.

At the January term, 1875, the demurrers were sustained. Thereupon, said Smith not asking leave to amend his answer to the petition, nor to plead further, the plaintiff submitted the cause to the court; whereupon the court found that said Smith, as drawer of said bill of exchange, owed to the plaintiff the sum of \$6,221.82, as alleged by the plaintiff, and that the action was one in which a several judgment could properly be rendered against said Smith as drawer of said bill, leaving the action to proceed against the parties defendant charged in the petition as acceptors; and a judgment was accordingly rendered against said Smith for said sum, and an order entered that the action proceed against the defendants charged in said petition as acceptors of said bill.

Smith afterward filed a petition in error in the district court to reverse said judgment. Before the cause came on to be heard, the plaintiff below, by leave of the court, remitted from said judgment the sum of thirty-two dollars, as of the date of rendition thereof, being the amount of interest included therein over and above the rate of six per cent. per annum, computed on the amount of said bill of exchange after its maturity, and leaving due on said judgment, at the rendition thereof, the sum of \$6,189.82. And thereupon the cause was heard, and the court adjudged that said judgment, deducting said sum of thirty-two dollars remitted as aforesaid, be affirmed, but at the costs of the defendant in error.

The entry of the *remittitur* of all interest over and above six per centum per annum, from the maturity of the bill to the rendition of the judgment, put an end to the question made by the demurrer to the first defence.

Leave is now asked to file a petition in error in this court, to reverse the judgment of affirmance of the district court, and also the judgment of the court of common pleas.

*L. English & J. W. Baldwin*, for the motion. I. The court erred in hearing the demurrer out of the order in which it stood on the trial docket. When a case is placed upon the trial docket of the term, it becomes subject to all of the regulations prescribed by the Code as to time of trial, under article 8, of title 9, sections 806 and 807.

Each trial docket for each term is intended for the disposition of the causes pending for adjudication in the court at that particular time; belongs to it; must be made solely in reference to it; and cannot be arranged, assigned, or disposed of in any other mode than prescribed by the law.

The court has no authority to prescribe how it shall be made or the actions thereon set for trial. That is the clerk's duty under the law, and not under any rule of court, for the latter has no authority to make any rule except in accordance with the law. When the court convenes, it takes the docket as made up, and the causes thereon assigned or set for particular days, in the order in which the issues were made up. The issues of fact cannot be tried, except in that *all* must be tried in their order. As to all other cases, however, a discretion is given as to the time of their hearing.

The discretion given to the court by section 307 is nothing other or more than to direct, if it deems expedient for the disposal of business, that all such cases may be taken out of the several places they occupy on the docket as to issues of fact, and be tried, or set for trial, at any particular time, in the order or priority in which they all have been placed upon the docket as to themselves "*inter sese*."

They may be heard out of the order in which they stand upon the docket as to issues of fact, but must be heard in the order in which they stand upon the docket as to issues like themselves.

II. The question arising under the fourth error assigned is: Does the act of Congress, under which it exists, authorize or permit a national bank to purchase a promissory note, bill of exchange, or other evidence of debt?

The banking powers of these associations are to be found in section 8 of the act referred to. This is the law of the bank's capacity, its life, powers, and existence. It accords with the nature of banking — "discounting and negotiating bills and notes; buying and selling exchange, coin, and bullion; loaning money on personal security." The reasons are manifest. Congress did not intend, and did not create, a horde of brokers' institutions, but what were expected to be associations in which capital could be placed and used with advantage to itself, and for the promotion of the business interests of the various communities in which they should be located.

These banks have no power except those conferred upon them by the act referred to. *Bank of U. S. v. Dandridge*, 12 Wheaton, 64; *Head v. Ins. Co.* 4 Cranch, 127; *Dartmouth College v. Woodward*, 4 Wheat. 436; *Bank of Augusta v. Earle*, 19 Peters, 587; *Penrose v. C. & D. Canal Co.* 9 Howard, 184; *Venango National Bank v. Taylor*, 6 P. F. Smith, 14; *Bank of Chillicothe v. Swayne*, 8 Ohio (pt. 2), 257.

By said act (and we only refer to section 8, because we conceive all its powers of banking are therein alone conferred) such bank has power to discount and negotiate promissory notes and bills of exchange. Do these terms include the power to purchase — buy such notes and bills? "Negotiate," cannot by any possibility be tortured into any such meaning as "purchase." But can the word "discount" cover any such meaning?

The language of the act was probably copied from the New York Free Banking Act of 1838, of which it is almost a literal transcript. The meaning of the New York act has been judicially determined. *Talmadge v. Pell*, 3 Selden, 328; *Niagara County Bank v. Baker*, 15 Ohio St. 68; *Flecher v. U. S. Bank*, 8 Wheaton, 388; Morse on Banking, 20.

It is claimed that section 30 is a recognition of the power to purchase: but it is only of "*bonâ fide* bills of exchange," not a mere evidence of debt; not paper made in that form to sell and raise money upon; not accommodation paper, nor even business paper made in that form, so as to insure its purchase at a greater rate of interest than the bank is allowed to receive as discount, but a *bonâ fide* bill of exchange — exchange as it is expressed in section 8, and not intended in any way as a shift for a loan of money, or a discount at illegal interest. The bill of exchange is not to be determined alone by its form, but by the real character of the transaction. *Corcoran & Riggs v. Powers*, 6 Ohio St. 19.

In the case at bar, according to the petition, all the defendants are



partners. One of these defendants drew the bill of exchange upon his firm, which is accepted by them at the same place where drawn, the firm's principal place of doing business.

A bill drawn by a man upon himself is a promissory note. *Beach v. Ostler*, 1 Mass. 120; 9 Ala. 76; *Miller v. Thomas*, 3 Mass. 576; *Allen v. Ins. Co.* 9 C. B. 574; *Ib.* 570; *Hoser v. White Pigeon Co.* 1 Doug. 193; *M. & M. R. R. Co. v. Dillon*, 7 Ind. 404; 2 Greenleaf, 121; 5 Ala. 657; 28 Barb. 390.

III. The bank, in the purchase of this paper, knowingly took and received more than six per cent. interest, the rate allowed by the law of the state where located. It, in fact, took and received nine per cent., which was illegal and usurious, and this should defeat the recovery of any interest at all. Sec. 30 of the National Banking Act; *Shunk v. First Nat. Bank of Galion*, 22 Ohio St. 508.

IV. The court erred in rendering a separate judgment against one of the defendants, Smith. The finding of the court is that Smith owes a certain amount as drawer. This is erroneous, where the petition shows, as it does in this case, that the bill is drawn by one partner upon the firm of which he is a member, and accepted by such firm. If, as shown above, such a bill is not a bill in reality, but a promissory note, all the incidents, rights, and benefits of a promissory note attach at the making of the paper, and govern all subsequent transactions, as well as holders thereof. Smith, in the eye of the law, is a joint promisor, and a separate action could not have been maintained against him. Under this judgment, what has become of Smith's liability as a member of the firm of Thompson, Griggs & Co., as one of the acceptors of said paper? His liability then is joint with them, and yet this judgment must merge all right of further action against his partners.

*Harrison & Olds, contra.* Section 307 of the Code clearly gave the court the right to hear the demurrers when it did.

It was clearly in the discretion of the court whether it would then hear the demurrers, and no abuse of discretion appears.

The court, in the exercise of its discretion, rightly ordered that the demurrers should be *then* heard.

We submit that this objection is frivolous, and could have been interposed for no other purpose than delay.

II. Has a national bank power to purchase a bill of exchange?

We submit that it manifestly appears from sections 8, 18, 30, and 39 of the act to provide a national currency, that such power is expressly given and clearly recognized. Section 30 has been construed in *The Farmers' & Mechanics' National Bank v. Dearing*, 23 Wallace, —. Also see *Buckingham v. McLean*, 13 How. 151; *Creed v. The Commercial Bank of Cincinnati*, 11 Ohio, 489; *Niagara Bank v. Baker*, 15 Ohio St. 68; *White's Bank of Buffalo v. Toledo Ins. Co.* 12 Ohio St. 601; *Morse on Banking*, 164.

The national currency act makes no distinction between sight drafts and bills of exchange, and time drafts or bills. The power granted is to buy and sell bills of exchange. Sight drafts are mentioned in section 30 solely for the purpose of declaring that the purchase, discount, or sale of a bill of exchange, payable at another place, at not more than the current

rate of exchange on sight drafts, in addition to the interest, shall not be considered usury.

The business of dealing in bills of exchange is a department of the general business of banking, and the business includes discounting, purchasing, and selling time bills as well as sight bills.

III. The third defence raises the question of usury.

But usury between whom?

Not between the parties to the original bill. They do not claim that the drawer or acceptors of this bill of exchange, or that any of the defendants in this action, were charged or paid any usurious interest.

The bill took its inception and had been negotiated before the plaintiff below bought it. It was an available and unimpeachable security in the hands of the payees, Harbaugh, Matthias & Owens. If they had continued to hold it until after due, they could have sued and recovered upon it, without the possibility of the assertion of any claim of usury on the part of the drawer or acceptors.

Now Harbaugh, Matthias & Owens, by their indorsement, transferred all their right and interest in the bill to the plaintiff below.

Consequently, the plaintiff can assert and enforce against the drawer and acceptors any rights that the payee could have asserted and enforced, and is subject to no defence that could not have been set up against the payees.

If Harbaugh, Matthias & Owens indorsed the bill upon a usurious consideration, and were sued upon their indorsement, then there might have been some pretence for them to plead usury; or, if they chose, they might waive it. If they paid usury, then they might raise the question whether they could not recover double the amount so paid. Or, if usurious interest was reserved or charged on their indorsement, they might raise the question whether, in an action against them, any interest could be recovered. But how the plaintiff in error can set up usury occurring in a transaction between wholly different parties as a defence to his obligation, which is untainted with usury, passes our comprehension.

According to the general rule of law applicable to the subject, even Harbaugh, Matthias & Owens could not allege usury of the transaction between them and the defendant in error. The bill was not originally negotiated by their sale. It had been negotiated before, and was a complete and available security in their hands. They could sell it for any price they saw fit; and such sale would not be usurious. The purchase of such paper in good faith is not a loan or forbearance of money. And a purchase for any sum less than the face of the paper is not usurious.

For a full discussion of this subject see 2 Parsons Bills & Notes, 426 *et seq.*, 429; *Dunkle v. Renick*, 6 Ohio St. 527.

This is the rule in Pennsylvania, where the transaction of sale took place. *Wycoff v. Longhead*, 2 Dallas, 92; *Griffith v. Ruford*, 1 Rawle, 196.

IV. Did the court err in rendering judgment against the defendant Smith, and leaving the action to proceed against the others?

Smith, individually, drew the bill of exchange, and was liable thereon as drawer.

The firm of Thompson, Griggs & Co., and the members thereof (of

whom Smith was one), jointly accepted the bill, and were jointly liable thereon as acceptors. Code, secs. 38, 555.

It is optional with the plaintiff to join in the same action parties who are severally liable on a bill of exchange or note. An obligation to sue all the parties is nowhere imposed. The only penalty for bringing more than one action is the payment of costs. *Green v. Burnet*, 1 Handy, 285.

On this bill the plaintiff below might have brought two actions: one against Smith alone, as *drawer*; another against the firm and members of Thompson, Griggs & Co., as *acceptors*. In each case a *several* judgment might have been properly rendered in favor of the plaintiff for its debt, but in only one would it have recovered its costs. Code, sec. 371; *Cloon v. City Ins. Co.* 1 Handy, 32; 2 Nash's Pl. & Pr. 1058.

WHITE, J. We find no error in this case.

We will briefly consider the several questions raised in argument.

1. It is alleged the court erred in hearing the demurrers to the answer before the cause was reached in its order on the trial docket . . . the time of hearing such cases is clearly within the discretion of the court.

2. The next alleged ground of error arises on the demurrer to the second and third defences.

The objections to the action of the court in sustaining the demurrers are, in substance:

1. That the bank, the plaintiff below, had not capacity to acquire title to the bill sued on.

2. That if it had such capacity, the usurious transaction by which it acquired the bill from the holders, Harbaugh, Matthias & Owens, disables it from collecting any interest from the antecedent parties.

As to the first of these objections, the answer in the first defence sets up that the bank purchased the bill of the holders, the payees. It does not state that the purchase was made at a usurious rate of discount; but it avers that under the act of Congress to provide a national currency, under which the bank was incorporated, it had no authority to *purchase* the bill.

It seems to be the idea of counsel making the objection, that negotiable paper, perfect and available in the hands of the holder, is not the subject of purchase by a national bank at any rate of discount. This view we think entirely erroneous. We see nothing in the act of Congress nor in reason why a borrower may not obtain the discount by a bank of the existing notes and bills of others of which he is the holder, as well as of his own paper, made directly to the bank.

It is true that, as between natural persons, the purchase of such paper, when made in good faith, and not as a disguise for a loan, is not subject to the usury laws; but it is otherwise as to a bank. In the business of banking, the purchasing and discounting of paper is only "a mode of loaning money." *Niagara County Bank v. Baker et al.* 15 Ohio St. 69; *Fleckner v. The Bank of the United States*, 8 Wheat. 333.

As to the second objection—namely, that the usury exacted by the bank from Harbaugh, Matthias & Owens, in the acquisition of the paper, disables it from recovering any interest from the antecedent parties.

The general rule is, that where a bill or note is valid, as between the

drawer or maker and the payee, so that the latter can maintain an action upon it against the former, it is valid in the hands of an indorsee, who has discounted it at a usurious rate of interest, and he may recover the full amount of the bill or note against the maker or acceptor. *Munn v. Commission Company*, 15 Johns. 44.

The question is, whether this principle has been modified by the act of Congress now in question.

Section 8 of the act defines the powers of the national banks. It declares, among other things, that they shall be authorized "to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt."

Section 30 prescribes limitations upon these powers, and imposes penalties upon the banks for the transgression of such limitations.

The section declares "that every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the state or territory where the bank is located, and no more," &c. It also declares that "the knowingly taking, receiving, or reserving, or charging a rate greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon." The section also contains a provision, that in case a greater rate of interest has been paid, the person or persons paying the same may recover back twice the amount of the interest thus paid.

Now manifestly, this section has reference to the agreement or transaction between the bank and its customer. It is the party with whom the bank had the usurious transaction to whom the forfeiture of the entire interest is to be adjudged, and who, in case it has been paid, is authorized to recover back twice the amount. The rights and liabilities of antecedent parties cannot be affected by the usurious character of a transaction in which they did not participate.

In the present case, if the indorsers to the bank — Harbaugh, Matthias & Owens — should take up the bill, under their indorsement, their right to recover the full amount from the drawer and the acceptors would be unaffected by the fact as to whether they had or had not asserted against the bank their rights growing out of the usurious transactions.

*Leave refused.*

McILVAINE, C. J., WELCH, REX, and GILMORE, JJ., concurred.

## SUPREME COURT OF MAINE.

(To appear in 65 Me.)

## CONSTITUTIONAL LAW. — VAGRANT. — COMMITMENT BY OVERSEERS OF THE POOR.

## CITY OF PORTLAND v. CITY OF BANGOR.

The fourteenth amendment of the federal Constitution provides that no state shall deprive any person of liberty without due process of law. *Held*, that the *ex parte* determination of two overseers of the poor is not such process.

The city of Portland sued the city of Bangor for supplies furnished the alleged pauper, in the workhouse of the plaintiff city, committed under a warrant of two overseers of the poor. *Held*, that the commitment was illegal, that the plaintiffs could not recover, and that the decisions in *Nott's case*, 11 Maine, 208, and in *Portland v. Bangor*, 42 Maine, 403, holding to the contrary, are inconsistent with the fourteenth amendment of the federal Constitution.

## ON MOTION. Assumpsit for alleged pauper supplies.

Harriet S. Ray, the alleged pauper, was committed to the Portland workhouse in 1871, under a warrant signed by two overseers of the poor, on an *ex parte* hearing, on the ground that she was an able-bodied, dissolute vagrant, exercising no lawful business and liable to become chargeable to the city. This action was brought for her board while in the workhouse for two months ending September 17, 1871, at \$2.50 per week. The verdict was for the plaintiffs for \$24.49; the defendants filed a motion to have it set aside, as against law and evidence.

*T. B. Reed*, city solicitor, for the plaintiffs, relied upon *Angeline G. Nott's case*, 11 Maine, 208, and *Portland v. Bangor*, 42 Maine, 403.

*A. G. Wakefield*, for the defendants.

WALTON, J. It was decided in *Angeline G. Nott's case*, 11 Maine, 208, that the statute of this state which declares that two or more overseers of the poor of any town or city may, by a writing under their hands, commit to the workhouse "all persons able of body to work, and not having estate or means otherwise to maintain themselves, who refuse or neglect so to do, and all such as live a dissolute, vagrant life, and exercise no ordinary calling or lawful business, sufficient to gain an honest livelihood; and all such as spend their time and property in public houses to the neglect of their proper business," violates no provision of our state constitution; and in *Portland v. Bangor*, 42 Maine, 403, that the expenses thus incurred for the support of either of these classes of persons while thus confined in the workhouse are, in contemplation of law, pauper supplies, and may be sued for and recovered as such of the town or city where such persons have their settlements.

If such an arbitrary exercise of power violates no provision of our state Constitution, it very clearly violates the fourteenth amendment of the federal Constitution. That article declares that no state shall deprive any person of life, liberty, or property, without due process of law; and while it may not be easy to determine in advance what will in every case constitute due process of law, it needs no argument to prove that an *ex parte*

determination of two overseers of the poor is not such process. *Dunn v. Burleigh*, 62 Maine, 24.

If white men and women may be thus summarily disposed of at the North, of course black ones may be disposed of in the same way at the South; and thus the very evil which it was particularly the object of the fourteenth amendment to eradicate will still exist.

The objection to such a proceeding does not lie in the fact that the persons named may be restrained of their liberty, but in allowing it to be done without first having a judicial investigation to ascertain whether the charges made against them are true. Not in committing them to the workhouse, but in doing it without first giving them an opportunity to be heard.

If the decisions in *Nott's case*, and in *Portland v. Bangor*, above cited, were correct when made, the power therein sanctioned can be exercised no longer. It is abrogated by the fourteenth amendment of the federal Constitution; and was at the time when the proceedings on which this action is founded were had. The proceedings being illegal, the action cannot be maintained. The verdict upon the undisputed facts of the case is contrary to law. It must therefore be set aside.

*Motion sustained. Verdict set aside. New trial granted.*

APPLETON, C. J., BARROWS, DANFORTH, VIRGIN, and PETERS, JJ., concurred.

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## SUPREME COURT COMMISSION OF OHIO.

(To appear in 27 Ohio State.)

MECHANIC'S LIEN. — SUB-CONTRACTOR. — CHANGE IN PLAN OF BUILDING. — NOTICE TO CORPORATION.

DUNN v. RANKIN & CO.

1. Under the statute to create a lien in favor of mechanics and others, the claim of a sub-contractor against the owner of the structure is limited to the work and materials furnished in performing a particular contract between the owner and contractor in relation to such structure; also to the amount unpaid on such contract at the time he delivers to the owner his attested account against the contractor for such work and materials.
2. Where independent jobs are let under separate contracts, though between the same owner and contractor, the liens of the sub-contractors are respectively confined to the amount unpaid on the particular contract each one aided the contractor to perform.
3. When a contract for a structure provides for changes in the plans and specifications, and extra work is done in completing the structure without a new contract, a sub-contractor of any part of the job may perfect a lien on the amount due from the owner to the contractor for such extra work.
4. When a sub-contractor seeks a lien under the statute against a corporation as the owner, the delivery of his attested account against the contractor to the agent or officer of the corporation, who is duly authorized to enter into the contract, under which the job is done, in his own name, and to account to the contractor and sub-contractor in accordance with their respective rights, is sufficient notice to fix the lien against the corporation.

ERROR to the superior court of Cincinnati.

June 12, 1869, George Bearly entered into a contract with the city of Cincinnati, acting by William F. Hurlbut, clerk of the board of education, whereby Bearly was to construct, by August 20, 1870, a school-house for the sum of \$81,000.

The work was to be done under the direction of the superintendent of school buildings, in accordance with plans and specifications furnished to Bearly, and in pursuance to which he made the contract.

Bearly was to be paid as the work progressed, except that twenty per cent. of the value of the work was to be reserved until the completion of the house. The contract contained, among others, the following provisions : —

“Moreover, it is understood and agreed that if any changes in said plans and specifications, and the work corresponding thereto, are considered advisable or necessary, the same may be done, and shall be executed by said Bearly, at such price as may be agreed upon between him and the superintendent of buildings ; but the same shall not be made without the consent of the building committee of said board, nor unless a memorandum of said changes and the price thereof be first made and signed by said Bearly and said superintendent.

“If, however, any of the sub-contractors of said work shall, at any time during the progress of said work, give notice to said board that they have not received pay for their estimated portion of said work, according to the terms of their agreement with said Bearly, then in such case it shall be lawful for the clerk of said board to settle directly with such sub-contractors ; their receipts for such direct payments to be taken as absolute payment and satisfaction for so much of the contract price of said house.

“It is understood that if any changes are made in said work, as above provided for, the above named contract price is to be increased or diminished, according to the agreement entered into as to such changes between said Bearly and said superintendent of buildings as shown by their memoranda of agreement.”

The school-house was completed, and accepted by the board of education on the 15th day of August, 1870 ; and, on the same day, the balance of the contract price, \$81,000, was paid over to Bearly.

On the 18th day of August, 1870, Rankin & Co., sub-contractors, filed their attested account against Bearly in the office of William F. Hurlbut, clerk of the board of education, who was then absent from the city, and did not return until the 22d of August.

August 22d, Dunn & Witt, sub-contractors on the school-house, filed their attested account against Bearly with the clerk of the board ; and in the evening, the claims of Rankin & Co., and Dunn and Witt were presented to the board of education. Finnegan & Son filed their attested account with the clerk of the board, August 26th.

Each of the above named accounts were for work done and materials furnished on the school-house, according to the original plans and specifications, and embraced within the contract price of \$81,000.

On the 27th day of August, 1870, the Greenlees & Ransom Co. filed its attested account with the clerk of the board of education for work and material furnished for a frame privy, which did not appear on the origi-

nal plans, and was never made any part thereof, and also its attested account for work and material in the school-house itself, which said work and material was over and above all work and material required in the completion of the original contract.

After August 15, 1870, there remained in the hands of the city \$1,377, due for this privy and extras in the school-house proper; and the amount so due was for work and materials furnished independent of the work and materials included in the contract for \$81,000.

On September 1, 1870, Rankin & Co. filed their petition in the superior court of Cincinnati against the city, alleging that they were sub-contractors upon the school-house; that there was due to them from Bearly the sum of \$3,313.23; that they had filed their account with the city as aforesaid; and asked judgment against the city for the amount in its hands due to Bearly.

The city filed an affidavit, stating that Dunn & Witt, Greenlees & Ransom Co., Finnegan & Son, Leonard Swartz, and George Bearly claimed an interest in said money, and by order of court they were made parties and required to set up or relinquish their respective claims. Subsequently, Edwin Long was made party defendant, and the answers and cross-petitions of Dunn & Witt, Greenlees & Ransom Co., Edwin Long, and Finnegan & Son, were filed in the case, also that of the city relating to the claim of Swartz.

The amounts claimed were all admitted to be due and correct in amount; and it was admitted by all parties that the claims of Greenlees & Ransom Co. and Edwin Long were for work and materials not included in the original plans and specifications. It was also admitted that the money left in the hands of the city at the time the first notice was filed was all due for work and material not provided for in the original plans and specifications.

The original plans and specifications provided for a brick privy, to be erected on the west side of the school-house, and provided for no other privy.

The city owned a lot on the east side of the school-house, which was subject to a leasehold interest at the time the contract for building the school-house was executed, but subsequently it purchased the leasehold; and thereafter, by the consent of Bearly, the brick privy he had contracted for was built on the east instead of the west side of the school-house, and a frame privy contracted for, to be built for the sum of \$463 by said Bearly, on the east side of the school-house, was located on the west side of the school-house, where the brick privy was originally to have been placed.

The Greenlees & Ransom Co. were the sub-contractors who furnished the wood-work for this frame privy, and at an agreed price of \$223.10. Edwin Long did the painting thereon, which amounted to \$35. The frame privy was built according to plans drawn and specifications made by the superintendent of school buildings, and made the basis of a new contract a year after the original contract for building school-house and brick privy had been executed.

This case came on for trial in April, 1871, at special term, and was reserved to general term. In general term, the court ordered all the money in the hands of the city and due Bearly, less costs of suit and the claim



of Swartz, to be paid to Rankin & Co., to which Dunn & Witt, Greenlees & Ransom Co., and Edwin Long excepted. They also filed a motion for a new trial, which was overruled and exceptions taken.

Thereupon they filed their petition in error in the supreme court to reverse the judgment of the superior court, on the ground that the judgment of the court was against the law and the evidence.

*Hoadly & Johnson*, for Dunn & Witt. We claim that the court below erred in holding that the notice of Rankin & Co. was served upon the city of Cincinnati earlier than the notice which we served upon the city, and also in ordering that all the money in the hands of the city at the time of said service should be paid to Rankin & Co.

We claim that actual service of our notice upon the city was made at the same time as the notice of Rankin & Co.; and that, therefore, we were entitled to *pro rata* distribution with Rankin & Co.

We also claim that even though it should be found that the notice of Rankin & Co. was actually served upon the city prior to the service of our notice, yet the same principle of law prevails as to sub-contractors which has been declared as to contractors, viz.: that as between themselves there is no priority, and hence we were entitled to *pro rata* distribution with Rankin & Co.

We claim that a service of notice upon the clerk of the board of education, or a filing of notice in the office of the clerk, is not such a service as would affect the money due to Bearly.

If the court should hold that the notice of Rankin & Co. was in contemplation of law filed before the notice of Dunn & Witt, then we claim that, as between sub-contractors, there is no priority, and their claims should be paid *pro rata*, if there should be insufficient money to pay them in full.

The law itself is silent on this subject. Nothing is said, either, as to the liens of contractors in reference to priority. But this court has held in the case of *Choteau et al. v. Thompson et al.* 2 Ohio St. 114, that as between lienholders there is no priority, and the reason given is, that the work, and labor, and materials of all, are contributed to a common purpose; the work of each assists to make the value of the whole.

The same reason exists as to sub-contractors: their work makes up the work of the contractor; the work of one is no more necessary than the work of the others. Then why should one be paid and others left unpaid? Because he files his notice first? So one contractor may file his notice long before another contractor, or even before the work of the other contractors is commenced, yet he shall take no advantage thereby. So it should be with sub-contractors; their rights are similar—their equities are equal—their relations are identical with those of contractors. The law of last winter recognizes this equity, and provides that sub-contractors shall fare alike under the lien law for mechanics and others.

The supreme court has never decided the question as to the rights of sub-contractors between themselves in a case like this. The superior court of Cincinnati, in 1856, in the case of *McCollum & Co. v. Richardson et al.* 2 Handy, 274, in general term, held that the first in time was first in right. But it is difficult to see why any different principle should be enforced as to sub-contractors, than that applied to contractors; and the opinion of the court in that case does not seem to us to lessen the

difficulty, or justify the difference held in that case. In cases of attachment, there seems good reason why the first served should take precedence; but as between contractors and sub-contractors, their rights and equities should not depend upon priority of time only in asserting their claims. If that were the rule, the contractor or sub-contractor who first finished his work on a building might "gobble up" all the money due on a building, or the proceeds of its sale; while the last contractor—the one who completed the building, and without whose services the building would be of little value—might be able to get nothing. The principle announced in *Choteau et al. v. Thompson* is an equitable and just one, and necessary to protect the rights of contractors. The same reason for the rule exists as to sub-contractors, and should be followed by the establishment of the same rule as between them.

There is one other view of the matter to be urged in this connection, and that is derived from the contract between the city of Cincinnati and Bearly.

By a provision of the contract the sub-contractors were provided with the means of having their claims paid in full, if notice had been given in time. This puts the sub-contractors on the same footing as the contractor; their receipts were as good as the contractor's, and the same rule would be applied to them as to different contractors; and there could have been no priority between the several sub-contractors.

*Reuben Tyler*, for Greenlees & Ransom Co. and Edwin Long. I. Neither the plaintiffs, Rankin & Co., nor any other sub-contractor of George Bearly, have any claim to any part of the money in the hands of the city and due Bearly, unless they were sub-contractors on the specific work for which said money was due. 1 S. & C. 833.

II. No part of the money remaining in the hands of the city, and due Bearly on August 18, 1870, when Rankin & Co. filed their notice, was due as consideration for any work or material on which Rankin & Co., Dunn & Witt, or Finnegan & Son were sub-contractors.

The truth of this proposition, so far as the evidence goes, is unquestioned; but Rankin & Co. and Dunn & Witt claim, and the superior court of Cincinnati held, that the original contract with Bearly must be so construed that *all* the work done by Bearly was included in and covered by the said original contract; whereas Greenlees & Ransom Co. and Edwin Long claimed, and still insist, that a frame privy, built under new plans and by virtue of a new contract, and contracted to be put on land, the possession of which the city did not have when said original contract was made, could not and cannot be included in said original contract; nor can said original contract (as we claim) be construed to embrace any extra work which was not included by the original plans and specifications, and not necessary to the completion of the house in accordance therewith, for the sum of \$81,000.

III. Greenlees & Ransom Co. and Edwin Long are the only parties who have any claim under and by virtue of the lien law upon the money remaining in the hands of the city, and due to Bearly after the 15th day of August, 1870.

This proposition is based on the evidence that Greenlees & Ransom Co. and Edwin Long were sub-contractors, and did use all the means the

law requires for securing pay for the work and material furnished for said privy and extra work, and that none of the other parties contributed thereto at all; and also follows as the logical and inevitable sequence of their view of the preceding propositions.

*E. L. De Camp*, for defendants in error. I. Was the money due Bearly from the city due him upon his contract?

If it is not, then this action must fail, and all the parties have mistaken their remedy.

The whole proceeding is based on the assumption that the money is due Bearly on the contract with the city, on which the parties are sub-contractors. It is therefore a contest between sub-contractors — a suit, not against the contractor as an individual seeking personal judgment, but a special remedy. A statutory remedy must be strictly pursued. One of the indispensable requisites to entitle a party to relief under this statute is, that he file with the owner an attested account of the amount and value of the labor performed.

We claim that the contract must be taken as a whole. It is clear and unambiguous, and therefore there is no room for the admissibility of parol testimony. The contract speaks for itself and needs no interpreter. All its terms are clear and distinct, and there is no room for doubt in the minds of the parties to the contract. It recognizes the clerk of the board of education as the proper medium between sub-contractors and the city, and as the authorized agent of the city herself in the payment of money. It directs the manner in which everything shall be done, the time within which it shall be done; provides for all changes and alterations which shall suggest themselves from time to time as the work progresses, and specifies the manner in which the agreed price of \$81,000 shall be increased or diminished according to the changes which shall be made. Can language be plainer, and is not the conclusion irresistible, that this contract was intended to cover all the work done upon the building and its various appointments, whether such work be extra work or not? Is not the plain meaning of this contract that the contractor was to go on and build the house, according to the plans and specifications, for the sum of \$81,000, but providing that alterations should be made in the plans and specifications according to the judgment of the city; and if the work was thereby increased, that the contractor should receive the amount of such extra work in addition to the stated sum of \$81,000, — thus covering all the work, whether done according to the plans and specifications as originally drawn, or modified according to the judgment of the city? This interpretation of the contract is so plain that it seems a useless task to attempt to argue it further.

Such being a fair interpretation of the contract, does not an alteration like that in the privy come plainly within its terms? According to the testimony in the case, it was originally intended that a brick privy should be placed upon the original lot; but it was found afterward to be impracticable on account of the nature of the ground, and a frame privy was put up on the very spot on which it was intended to have placed the brick privy, and the brick privy was put up on an adjoining lot subsequently purchased. Can it be said with any force that this was not, in the language of the contract, "a change in said plans and specifications and the work corresponding thereto, considered advisable or necessary?"

The contract itself is sufficient, without anything else, to support the assertion that the clerk of the board of education was the duly authorized agent of the city in this matter. He is specially designated in the contract itself as the medium of communication between the city and sub-contractors. The object and intention, as well as the effect of filing an attested account by a sub-contractor, was to stop the payment of the money. No money could be paid out by the city treasurer except on a warrant of the city auditor, and the city auditor would not and could not draw his warrant except on the certificate of the clerk of the board of education. Here, then, is the only medium through which any one could draw money from the city treasury on account of the school fund. Without the certificate of the clerk of the board of education, not one cent could be appropriated to the payment of any claim, however just. Disney's Laws and Ordinances, sec. 8, p. 775.

Service on the authorized agent of a corporation is service on the corporation. Angell & Ames on Corp. sec. 305, and authorities cited.

DAY, J. It is conceded that the city of Cincinnati is indebted to George Bearly, as contractor for work and materials in erecting the building mentioned, in the sum of \$1,377. The amount so due to him is claimed by his sub-contractors, under the provisions of the "Act to create a lien in favor of mechanics and others in certain cases" (S. & C. 833), and Bearly admits that their claims, as against him, are just and due; the controversy, therefore, relates solely to the distribution of the fund between them.

The amount due to Rankin & Co. from Bearly is greater than the amount due to him from the city. They claim that they filed their attested account with the city before any of the other sub-contractors, which gives them the priority, and entitles them to the whole fund.

Dunn & Witt claim that they filed their attested account with the city at the same time with Rankin & Co., and so are entitled to their proportionate share of the fund with them, to the exclusion of the other sub-contractors who filed their attested accounts at a later date.

The Greenlees & Ransom Co. and Edwin Long claim they are entitled to the whole fund, in proportion to their several accounts, on the ground that the amount due to Bearly from the city is for extra work and materials, not embraced in the school-house contract, a part of which extra work and materials constitute the whole amount of their accounts; while those of the other sub-contractors are included in the specifications and contract for building the school-house.

The first question to be considered, then, is, whether the fund in dispute arises upon one contract or different contracts between the owner and contractor; for, under the statute, the claim of the sub-contractor against the owner of the structure is, by fair construction, limited to the work and materials furnished in performing a particular contract between the owner and contractor; also to the amount due on said contract at the time he delivers to the owner his attested account against the contractor for such work and materials. If there be distinct jobs of the kinds enumerated in the statute, under separate contracts, though under contracts between the same owner and contractor, the liens of the sub-contractors are respectively confined to the amount due on the contract each one

aided the contractor to perform; the same as it would be if the owner had contracted each job to a different contractor; for the policy of the statute is not to give a general lien to the sub-contractor, but to give him a right to the fund to which his own labor or materials have contributed.

In June, 1869, the city, through its duly authorized agents, contracted with Bearly to build a school-house for \$81,000, in accordance with detailed plans and specifications, including a brick privy. About a year afterward, it was determined to build another privy, to be constructed of wood. This structure not being expressly included in the specifications or provisions of the school-house contract, new plans and specifications for this work were submitted to Bearly, who proposed to do it for \$463. His proposition was accepted, and a contract was entered into with him accordingly.

It is claimed that inasmuch as "changes" in the "plans and specifications," which are made part of the original contract, are provided for in that instrument, this new structure is embraced therein, and must be regarded as erected under that contract. But the new privy was not a change in the original plans. It was a new building, and, although an appurtenance to the main edifice, it was a distinct and separate structure, erected under another contract than that of the other buildings, as much as it would have been had the new job been contracted for by another person. The amount agreed to be paid Bearly for the frame privy remains unpaid, and, in accordance with the principle already stated, his sub-contractors, to the extent their work and materials went into that structure, may acquire a lien thereon pursuant to the statute, while those who contributed only to the other building cannot.

The balance of the amount in controversy is due to Bearly for extra work and materials that went into the principal building, as to which there was no contract other than the original one, and this work may fairly be regarded as embraced in the "changes" provided for in that contract. A lien may therefore be acquired upon the balance so due by the sub-contractors who did work or furnished materials in performance of the original school-house contract, and including the extra work in completion thereof.

The Greenlees & Ransom Co. and Edwin Long were the only sub-contractors who did or furnished anything toward the erection of the frame privy. The other parties, therefore, can acquire no lien, under the statute, to that part of the fund due for that structure; and that part of the amount due to the Greenlees & Ransom Co. and to Long, in excess of what is due to them for work and materials which went into the building erected under the new contract, falls into the same condition with that of the other sub-contractors.

The next question to be considered relates to the priorities between the sub-contractors upon that part of the fund due to Bearly upon the original contract. It is claimed that, as between sub-contractors, there is no priority. But it has been settled that, as the statute stood at the time this transaction arose, those first in time in delivering their attested accounts to the owner were prior in right. *Copeland v. Manton*, 22 Ohio St. 398.

We must then determine whose account was first delivered to the owner

in compliance with the statute; and here the contest is only between Ransom & Co. and Dunn & Witt, for the notices of all the others were subsequent to theirs, and the priorities under the latter notices are not questioned.

All the notices were left at the office of the clerk of the board of education. Rankin & Co. left their notice or attested account at the office on the morning of the 18th of August, 1870. The clerk was then absent from the city, but the office was in the care of an employee, who attended to all matters that did not require the official action of the clerk. The clerk returned to the office in the morning of August 22, 1870, and Dunn & Witt deposited their claim in the office at five o'clock P. M. of that day. Both claims were read to the board of education in the evening of the same day.

It is claimed, in behalf of Dunn & Witt, that neither party obtained any lien until the board of education was notified of their claims, and that their notices to the board being simultaneous, they are equal in right as to the fund in dispute. On the other hand, it is claimed, on behalf of Ransom & Co., that a lien was fixed thereon by their notice to the clerk of the board, which they claim was prior to that of all others.

Without determining whether the leaving of an attested account at the office of the clerk was sufficient to create a claim against the city under the statute, we think that, under the circumstances of this case, it was sufficient for that purpose to deliver it to the clerk, for a corporation was the owner, and could know or act only through its duly constituted officers or agents. It is true the board of education was invested with general authority as to all matters appertaining to public school buildings; but it appears that in this instance the clerk of the board was authorized by the board, with the concurrence of the city authorities, to enter into this contract in his own proper name, and was expressly authorized by the contract, on notice to the board by the sub-contractors, to settle with them directly all their claims against the contractor arising under the contract. Thus all the parties connected with the contract, under which these claims arise, recognize the board of education and its clerk as the practical agencies to deal with in regard to any claim that may become due under the contract, and they agree upon the clerk of the board as the disbursing officer or agent under the contract for both the board and the city. He therefore became a proper agent of either corporation to receive the notices of the sub-contractors as the person standing in the position of the owner as to the amount due to Bearly under the contract. Notice to any other agency or officer of these corporations could not as effectually stop payment to the contractor, which is the first thing to be done to accomplish the purpose of the statute, — to secure the sub-contractor and at the same time protect the owner.

Undoubtedly, the claim of a sub-contractor can be charged upon the owner only in the way prescribed by the statute — by delivering his attested account against the contractor to the owner. But when the owner is a corporation, the delivery of such account to the person whom the corporation has authorized to be its representative or active agency to act in the special matter arising under the contract upon which the claim is based, is a compliance with the statute; for such person or officer must be

regarded as the proper medium for reaching the corporation, or as the one having its authority to receive such notice.

The court below found that, as matter of fact, the clerk received the attested account of Rankin & Co. before that of any of the other sub-contractors was received. We cannot say that finding was unwarranted by the evidence, and must therefore concur therein. It follows that Rankin & Co. have the prior right to that part of the fund due on the original contract; and, as the amount due them from Bearly is greater than the amount due on that contract, that part of the fund will be exhausted in paying them.

The balance of the fund is due upon the contract for the frame privy. Upon this part of the fund, the Greenlees & Ransom Co. and Edwin Long have the prior claim to the amount that the work and materials in their respective accounts went into that job. There is no specific lien upon the balance of the fund remaining due under this contract, other than what has resulted from this suit; and, after paying the costs and the judgment in favor of Swartz — which was not excepted to by the only party it affects — should be divided between all the sub-contractors not fully paid, in proportion to the balance remaining due to each of them after the applications before indicated.

It follows that the judgment in favor of Swartz must be affirmed, and that in all other respects it must be reversed.

*Judgment accordingly.*

SCOTT, Chief Judge; WHITMAN, WRIGHT, and JOHNSON, JJ., concurred.

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**MECHANIC'S LIEN. — CONTINUANCE OF LIEN DURING SUIT. — LIEN MAY BE ENFORCED AGAINST PREMISES IN HANDS OF BONÂ FIDE PURCHASER WITHOUT ACTUAL NOTICE.**

**AMBROSE v. WOODMANSEE.**

1. Where the holder of a mechanic's lien, within the two years for which his lien remains operative, commences an action on his account, to obtain a personal judgment for the amount thereof, such lien is, by the provisions of the statute creating it, continued until the action is determined, and until the judgment obtained by the plaintiff is satisfied.
2. The premises charged with such lien may be subjected to the satisfaction of the same, as against a purchaser in good faith, who bought without actual notice of plaintiff's claim, pending the action thereon, and after the expiration of said period of two years.

**ERROR** to the district court of Montgomery County.

Defendant, Woodmansee, owned real estate in Montgomery County, and employed Ambrose, the plaintiff, to plaster a house which he built thereon.

Ambrose did the work, and within four months thereafter proceeded to obtain a lien upon the property for an unpaid balance of about \$160, due

him under his contract, by filing his account for work and materials, properly verified, with the county recorder, pursuant to the requirements of the statute; and causing the same to be recorded in the mechanics' lien book. This was done July 21, 1865. On the same day he brought an action before a justice of the peace of the same county against Woodmansee on said account, and on the trial recovered a judgment against Woodmansee only for \$85.45.

Plaintiff appealed the cause to the court of common pleas, where he recovered a judgment, April 7, 1869, for the sum of \$197 and costs, taxed at \$121. On this judgment he caused execution to issue, which was returned by the sheriff unsatisfied. In the mean time, in August, 1867, Woodmansee sold and conveyed the premises to the defendant, Wolf.

Plaintiff thereupon instituted the proceedings now under review by commencing an action in the court of common pleas of Montgomery County, against the defendants, Woodmansee and Wolf, setting up all the foregoing facts in his petition, and seeking to subject the premises to the satisfaction of his said judgment, in virtue of his alleged lien.

Wolf answered, averring that he purchased and paid for the premises in good faith, in August, 1867, without any knowledge of plaintiff's claim, and that the plaintiff did not, within two years from the filing of his lien, bring an action to enforce the same, though he admitted that suit was brought and judgment obtained as stated in the petition.

To this answer plaintiff demurred, as not stating facts sufficient to constitute a defence. The court overruled plaintiff's demurrer, and dismissed his petition at his costs.

On petition in error filed in the district court for the reversal of this judgment, it was subsequently affirmed by that court, and plaintiff now asks a reversal of both these judgments.

*J. A. Jordan*, for plaintiff in error. The original action was brought under section 8 of the mechanics' lien law (S. & C. 838).

Having obtained a judgment under this statute for the amount claimed, a bill in equity was filed under the Act of March 25, 1851 (S. & C. 837).

These laws were both passed before the Code, and at a time when the distinction existed between judgments at law and decrees in equity; and at the time the statute was passed containing said section 8, it was intended that a judgment at law should be obtained, and it was doubtful whether a bill in equity could be maintained. *Ziegler v. Seibolt*, 3 West. L. J. N. S.

1. Section 8 provides for a suit for a *judgment* at law.

2. The Act of 1851, in giving the right to file a bill in equity, makes it an "*additional*" remedy, and concludes, "anything in said act to the contrary notwithstanding."

The statute of 1851 did give the "*additional*" remedy of a suit in equity. But undoubtedly this additional remedy was only necessary where, at the time the action was brought, there was some equitable necessity for it, such as marshalling liens, adjusting equitable questions, &c., and not when a suit at law for judgment and execution on that judgment would have availed to collect it. This was the case when the original suit was brought, for then the rights of Wolf had not intervened. And even if some equitable question did make it proper to go into a court of



equity, there was no necessity of doing so to save the bar of the statute; for the statute of 1843, sec. 8, provides for suit for judgment, and that after the suit for judgment was brought "the lien shall continue until such suit or suits be finally determined and satisfied." And the statute of 1851, while it gives equitable jurisdiction, gives it simply as an additional remedy.

But counsel for Wolf claim that because section 8 provides that judgment may be sought "according to the course of legal proceedings in like cases," that a suit must be brought in equity under that section in the first instance. Mr. Hitchcock thought otherwise, and the fact that equitable jurisdiction was conferred in 1851, as an additional remedy, "anything in said act to the contrary notwithstanding," shows like cases did not mean equity. Like cases meant just as the statute says. Like cases *for judgment* which could be enforced the same as in cases where any judgment was obtained on which an execution could issue. Of course after judgment, even under the statute of 1843, equity would take jurisdiction if a clear title could not be given under sale on execution.

If it were necessary to go into equity in the first instance to save the bar, then a mechanic who did work could not perpetuate his lien under section 8 by suit before a justice of the peace, but would have to employ a lawyer and file a bill in equity in a court of record. This certainly was not intended. But it is claimed that if a mere judgment on the account would perpetuate the lien and be a *lis pendens* as to other parties, then an action could be brought in any other county in the state, and it would perpetuate the lien.

I think this is an overstrained construction. The term, "according to the course of legal proceedings in like cases," would apply to meet such a case. Of course it should be such a judgment as could be enforced by execution against the property, and if suit were brought in another county, execution would have to be sent to the county where the land lies. The law does not require a suit to make it notice, but only to perpetuate the notice given by filing the lien. This is all the notice required; and Wolf could have discovered by going to Ambrose whether suit had been brought. The mechanics' lien record showed that Ambrose claimed a lien; this was the notice the law required, and was notice enough to put Wolf on inquiry. This was the *lis pendens*.

It is argued that section 8 requires a suit upon the account, and for judgment upon it, and that this account is a written account giving a description of the property, and filed with the recorder. Certainly "for judgment," but not to enforce by any equitable decree the lien, and hence the suit is only on the account for judgment, without any reference to enforcing it as a lien by decree in equity.

*Hawk & McMahon*, for the defendant in error, John Wolf. Our claim is that a mechanic's lien is barred in two years after the completion of the labor, unless an action is commenced *within two years to enforce the lien*, in which case the lien continues until the case is determined and the money paid. Secs. 7 and 8.

I. The mechanic's lien is the creature of law. The statute creates and regulates it, and points out the method of enforcing it. Prior to the amendatory Act of March 25, 1851 (1 S. & C. 837), the proceeding was

regarded as purely *statutory*, and the remedy *legal*. This is plainly inferrible from the language of the amendatory act, and from the fact of its passage; and it was held in the supreme court on the circuit that there was no remedy in chancery, *because* the statute gave a *legal* remedy; not merely on the account *personally*, but against the *property*. *Mushitt v. Silverman*, 50 N. Y. 360.

II. The action contemplated in section 8 of the lien law is not a mere personal action against the debtor upon the debt; it is an action upon the *lien*, instituted for the purpose of enforcing the claim against the *property*. To amount to a *lis pendens* within the meaning of the lien law and the principles of natural justice, it should contain evidence that it was a claim against property as well as against the person. Otherwise, snares would constantly be laid for the innocent.

III. The statute providing for liens, both upon real and personal property, provides for their enforcement "according to the course of legal proceedings in like cases."

But in any proceeding to enforce *against real estate*, the action to enforce the lien can only be brought in the court of common pleas, without reference to the amount. Proceedings against land have never been allowed, so far as our information extends, before magistrates. If a judgment is obtained, and there are no goods and chattels, a transcript must go up to the common pleas. If an attachment is issued and levied upon real estate, it must be certified up. And such has been the uniform policy of the state.

Under this view, section 8 requiring proceedings to be as in like cases, the action should be in the common pleas court of the county where the property is situated. *Bowers v. Pomeroy*, 21 Ohio St. 184.

IV. The doctrine of notice *pendente lite* does not apply in a case where the court had no jurisdiction of the *thing* in controversy, as where the court has jurisdiction of the person, but not over the *land* in controversy. *Carrington v. Bronts*, 1 McLean, 167; *Philips on Liens*, ch. 34.

SCOTT, Chief Judge. The lien which the plaintiff sought to enforce in the court below is given by the "Act to create a lien in favor of mechanics and others in certain cases," passed March 11, 1843 (S. & C. 833). The 7th section of that act provides for the manner of making out, and filing in the office of the recorder of the proper county, an account, in writing, of the labor and materials furnished for which a lien is sought; and declares that the account so made and filed shall, for two years after the completion of such labor, or the furnishing of such materials, operate as a lien, &c. The 8th section reads as follows: "That every person or persons holding such lien may proceed to obtain judgment for the amount of his or their account thereon, according to the course of legal proceedings in like cases; and when any suit or suits shall be commenced on such accounts, within the time of such lien, the lien shall continue until such suit or suits be finally determined and satisfied."

The plaintiff, having perfected his lien by properly making out and filing his account, proceeded forthwith to obtain a judgment for the amount thereof, pursuant to the provisions of this section. But more than two years elapsed before he succeeded in obtaining a final judgment for the amount of his claim. Execution having been issued upon this judgment

and returned unsatisfied, he then commenced the present action under the amendatory Act of March 25, 1851 (S. & C. 837), which is as follows : "That any person or persons who now hold or shall hereafter hold a lien under the above-recited act, may, in addition to the remedy therein provided for, proceed by petition in chancery, as in other cases of liens, against the owner or owners of, and all other persons interested, either as lien-holders or otherwise, in any such boat, vessel, or other water-craft, or house, mill, manufactory, or other building or appurtenance in the first section of said act mentioned, and the lot or lots of land on which the same shall stand, and obtain such final decree therein for the rent or sale thereof as justice and equity may require, anything in said act to the contrary notwithstanding."

The theory of the defence is, that no action having been brought for the direct enforcement of plaintiff's lien within two years from the completion of his work, the lien can no longer be asserted against the premises, which are held by Wolf as a *bond fide* purchaser, without actual notice of plaintiff's claim.

Prior to the passage of the amendatory Act of 1851, the holder of a mechanic's lien could not have proceeded in equity to enforce it until he had first ascertained and liquidated the amount of his account by a judgment at law, as provided for in the 8th section of the original act. It was so held by the supreme court (per Judge Hitchcock) on the circuit. *Western Law Journal*, vol. 8, p. 569.

And such was the evident understanding of the legislature, otherwise the amendatory Act of 1851 would be wholly superfluous ; for its sole purpose and effect is to permit the lien-holder to proceed in equity in the first instance.

But this amendatory act left the original section 8 in full force. It simply gave a remedy "*in addition to*" that given by the original act. It allowed a lien-holder "to proceed by petition in chancery as in other cases of liens," in the first instance, "*anything in said act to the contrary notwithstanding.*"

The result is that a lien-holder might still proceed, under section 8, to obtain a judgment at law on his account. In many cases he might obtain satisfaction of his judgment without the aid of a court of equity ; and it is the clear policy of this section that this course might be adopted without prejudice to the lien. Its plain language is : "When any suit or suits shall be commenced on such accounts within the time of such lien, the lien shall continue until such suit or suits be finally determined and satisfied." The lien in this case was not created by a *lis pendens*, but by the filing of the account in the recorder's office, of which Wolf had constructive notice ; and he was thereby put upon inquiry whether suit had been brought on the account within the two years given by the statute, and whether the judgment obtained thereon had been satisfied.

We think the demurrer to defendant Wolf's answer was well taken, and should have been sustained by the court of common pleas, and that the district court erred in affirming its judgment. We therefore reverse the judgments of each of said courts, and remand the cause to the court of common pleas for further proceedings.

DAY, WHITMAN, WRIGHT, and JOHNSON, JJ., concurred.

## SUPREME COURT OF WISCONSIN.

[JUNE, 1876.]

STATE AND FEDERAL JURISDICTION. — POWERS OF THE STATE IN RESPECT OF LEGISLATION. — STATE CANNOT BE SUED INDIRECTLY. — MORSE v. INS. CO. — EXTRA-JUDICIAL DECISION NOT BINDING. — INJUNCTION. — MANDAMUS, ETC.

## STATE v. DOYLE.

1. The fact that a suit affecting the prerogatives of a state has been settled by a state officer is immaterial as affecting the jurisdiction of an appellate court.
2. The omission in a statute to provide for notice to parties in interest does not render the statute invalid.
3. The revocation of a license is a ministerial act.
4. In *Morse v. Ins. Co.* 20 Wall. 445, it was decided that the right of a corporation to remove a cause from a state to a United States court might be exercised, even though the party had agreed that the cause should not be removed, and that the agreement not to remove was not rendered valid by a state law authorizing it. The constitutionality of the state law was not in issue, and the decision that it was invalid was extra-judicial.
- A state statute providing that a corporation shall be compelled to file with a state officer, as a condition precedent to its doing business in the state, an agreement not to remove causes in which it is a party, is within the power of the state, even if the agreement is not valid in law. Such a statute is purely a matter of state policy and not subject to federal control in any form.
5. If such a statute is unconstitutional, the state officer has no power to issue a license to the corporation, and should be commanded to revoke any license he may have issued.
6. A state cannot be sued indirectly by proceedings against one of its officers, and where so sued in a federal court the jurisdiction of the state courts will not be ousted. Even if the federal court has granted an injunction, the state court may issue a writ of mandamus to the party enjoined commanding him to violate the federal writ.

RYAN, C. J. delivered the opinion of the court.

The facts of this case were discussed at the bar, on the motion to quash the alternative writ. But as some of them did not then appear of record, we refrained from any expression of opinion in overruling the motion. All the material facts are now before us for final adjudication.

It appears by the return that the license of the insurance company, in force when these proceedings were commenced, expired by limitation pending the alternative writ; and that some three days after the motion to quash the alternative writ was denied, the respondent renewed the license for another year. His doing so, under the circumstances, may have been an act of questionable propriety. But the fact itself is immaterial here, because it was agreed by counsel, if it were otherwise doubtful, that if a peremptory writ should be granted, it should cover any subsisting license issued by the respondent to the insurance company.

The motion to quash the alternative writ was argued for the respondent by the attorney general. The demurrer to the return was argued for the respondent by the learned counsel who represented the insurance company

in the federal court, and a brief was afterward submitted on his behalf by the attorney general. Different questions were raised for the respondent by the different counsel, which will be considered in proper order.

I. It was stated by the attorney general that the suit of the relator against the insurance company had been settled; that the relator has no further interest in the question, and therefore no further right to the writ. The fact does not appear of record, but it is immaterial.

So far as the private right of the relator is concerned, it is now well settled that this court would not assume original jurisdiction to enforce it. *Attorney General v. Railroad Companies*, 35 Wis. 425; *Attorney General v. Eau Claire*, 37 Wis. 340; *State v. Baker*, 38 Wis. 71; *State v. Supervisors*, Ib. 554. But, as it is said in *Attorney General v. Railroad Companies*, "In a government like ours, public rights of the state and private rights of citizens often meet, and may well be involved in a single litigation. So it may be in the exercise of the original jurisdiction of the court. The prerogative writs can issue only at the suit of the state, or the attorney general in the right of the state. They may go on the relation of a private person, and may involve private right." And the question before us is not upon the private right of the relator, and is independent of the accident that there is a relator in the case. The question on which the exercise of jurisdiction here must turn is, whether the subject matter of the writ is one "*Quod a statum reipublicæ pertinet*"; one affecting the sovereignty of the state, its franchises, or prerogatives." *Attorney General v. Eau Claire*, *supra*. And on this question there appears to us to be no room for doubt.

Save by the voluntary license of the state, the insurance company has no right to carry on its business within the state. The state sees fit to grant a license to it, upon condition, instantly revocable upon condition broken. The insurance company breaks the condition, but claims the right, notwithstanding, to act under the license throughout the State; claims that the condition is void, and that the license is therefore independent of the condition on which it was granted. And it assumes to carry on its business throughout the state, under the license, in defiance of the condition. Here is very plainly a direct and proximate interest of the state, affecting the state at large, in some of its prerogatives, and raising a contingency requiring the interposition of this court to preserve the prerogatives of the state in its sovereign character. *Attorney General v. Eau Claire*.

The statute of the state devolves upon the respondent the imperative duty of revoking the license of the insurance company, upon condition broken, and prohibits a renewal of the license for three years. The respondent claims that the statute so far is void, and wholly disregards it. Upon condition broken, he refuses to revoke the subsisting license of the insurance company, and upon its expiration renews it. Whether the respondent be right or wrong in his view, and that is for this court and not for him to determine, it is very certain that it concerns the state at large, that one of its principal officers executes his office in positive and deliberate disregard of a public statute defining its duties.

Such a case, when presented, is one eminently calling for the exercise

of our original jurisdiction; one, with or without a relator, eminently fit to be presented to the court for adjudication. The writ of mandamus, in such a case, eminently serves its function as a prerogative writ.

II. It was objected to the statute, by the learned counsel who argued the demurrer, that it provides for no notice to the insurance company, gives it no opportunity of being heard on the question of revocation for condition broken. It might have been more provident to have required such notice; but that rested entirely in legislative discretion. It was for the legislature alone to say whether or not the insurance company should have license to act within the state; and if so, on what conditions, and how revocable, such license should be granted. Authorizing such a license, out of its mere discretion, it was competent for the legislature to impose any conditions, reasonable or unreasonable, and to provide for revocation, upon any cause or no cause, in any manner it might see fit.

It was for the insurance company to elect whether it would seek or accept the license authorized on the very terms on which it was offered, at its own peril of the very power of revocation reserved. And, having elected to accept the license, it cannot now set up a vested right in the license, inconsistent with the license and in defiance of the terms and conditions on which it was granted. It voluntarily ran the very risk of summary revocation, *ex parte*, to which it now objects. It took the license *cum onere*, and has no just ground of complaint that the license is not more favorable to its interests.

We have carefully examined the numerous authorities cited on this point, and are unable to discover the application of any of them to the revocation of a voluntary license, in the precise manner reserved in the license itself.

III. It was likewise urged that the duty of revocation imposed upon the secretary of state, operates to confer judicial power upon that officer.

We cannot think that either the power to grant a license or the power to revoke it, involves the exercise of a judicial function. Both appear to us to be plainly and equally ministerial functions. The secretary, upon certain facts appearing to him, is authorized to issue a license; upon certain other facts appearing to him, is required to revoke it. This is a common condition of ministerial duty. In such a case, the ministerial officer must exercise his personal intelligence in ascertaining the fact upon which his authority is founded; but he acts upon his peril of the fact, and can in no sense be said to exercise a judicial function. If the use of personal judgment in such cases should be held to be judicial, the distinction between ministerial and judicial functions would be very much removed.

The secretary of state is a ministerial officer, authorized by law to perform different duties, upon different contingencies. If he make mistakes of fact in the performance of his functions, his action may be void or voidable only, in different circumstances. But he cannot judicially determine the facts on which he acts or refuses to act. This can only be done by the courts, whose duty it is, in proper cases, to review his action and determine the facts and his official duty upon them.

IV. It is contended, not that the statute of the state, prescribing the condition upon which license shall be granted, is a violation of the federal

Constitution, but that it has been so adjudged by the supreme court of the United States, and that thereupon and thereby the statute has ceased to have any force.

For the purpose, as Waite, C. J., remarks (20 Wall. 459), of putting foreign insurance companies, licensed to do business in this state, upon equal footing with its own companies, sec. 22 of chap. 56, of 1870, requires foreign companies, before license, to file an agreement in the secretary's office, not to remove causes against them from the state to the federal courts.

In *Morse v. Ins. Co.* 30 Wis. 496, the insurance company had, in violation of its agreement, petitioned the state court to remove the cause from the state to the federal court, under the act of Congress. This court held the agreement to be a valid relinquishment of the right of such removal, obligatorily upon the insurance company, and gave judgment against it. The judgment of this court was taken by writ of error to the supreme court of the United States. And that court in *Ins. Co. v. Morse*, 20 Wall. 445, reversed the judgment of this court, upon the ground that such an agreement did not deprive the insurance company of the right of removal to the federal court, under the Constitution and laws of the United States.

The question was certainly not free from difficulty; and while we think, with all due deference, that the weight of authority and sound principle sustain the views of this court, it is our duty and pleasure to submit to the decision of the federal court, on a point unquestionably within its final jurisdiction.

Under that decision, it follows that the jurisdiction of the state court in that case was ousted, upon the presentation of the petition to remove the cause to the federal court, and that all subsequent proceedings in the state courts were *coram non jure*. *Gordon v. Longest*, 16 Peters, 97; *Kanouse v. Martin*, 15 How. 198; *Ins. Co. v. Dunn*, 19 Wall. 214.

The sole question, therefore, before the federal court, upon the writ of error in *Ins. Co. v. Morse*, was whether the right of the insurance company to remove the cause to the federal court remained, notwithstanding the agreement. Upon that point only is the judgment in that case conclusive on this court; upon that point only is the opinion of that court authoritative with this.

"This court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties. In *Cohens v. The State of Virginia*, 6 Wheat. 264, this court was much pressed with some portion of its opinion in the case of *Marbury v. Madison*. And Mr. Chief Justice Marshall said: 'It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases

is seldom completely investigated.' The cases of *Ex parte Christy*, 3 How. 292, and *Peck v. Jenness et al.* 7 How. 612, are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression. Its weight of reason must depend on what it contains." *Carroll v. Carroll*, 16 How. 275. The rule is elementary, but we choose to give it in the words of the court to whose opinion we consider it presently applicable.

*Ina. Co. v. Morse* was decided by a divided court. The opinion of the majority, delivered by Mr. Justice Hunt, applies to the agreement of the insurance company, not to remove the cause to a federal court, the general and familiar rule, that parties cannot, by contract, oust the ordinary courts of their jurisdiction; citing to that effect several cases, English and American, and quoting the rule from Story's Eq. sec. 670, in these words: "And where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, — such as an agreement, in case of any disputes, to refer the same to arbitrators, — courts of equity will not, any more than courts of law, interfere to enforce that agreement; but they will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded or interfered with by such stipulations, if they were specifically enforced."

Having held the rule to be otherwise applicable to the agreement of the insurance company, the opinion proceeds to inquire, whether the agreement gains validity from the statute of the state requiring it; and holds that it does not, because the right of removal is given by the Constitution and laws of the United States, and therefore the majority of that court reversed the judgment of this court, on the ground that the petition to remove the cause to the federal court had ousted the jurisdiction of the state court.

So far, the opinion deals with the question involved in the case. Having so held, the opinion had exhausted the question before the court; had exhausted its appellate jurisdiction to this court; had exhausted its concern with the statute of the state. In its own view of the question before it, the only concern of that court with the statute of the state, was, whether it could operate to take the agreement out of the general rule held to be applicable to it. The agreement was directly before the court; the statute at best was only before the court collaterally. And we may be pardoned for suggesting that, the validity of the statute not being directly involved in the decision, the declaration that it is unconstitutional overlooked the universal rule of all American courts, sanctioned by that court (*Cooper v. Telfair*, 4 Dallas, 14; *Parsons v. Bedford*, 3 Pet. 433; *United States v. Coombs*, 12 Pet. 72), that courts will avoid an interpretation or application of a statute rendering it unconstitutional; and will hold one so, only in plain and peremptory cases; and with the domestic policy of the statute, with the right of the state to refuse license to insurance companies refusing to make the agreement, that court had no concern.

"This court has no authority to revise the act of Wisconsin, upon



any grounds of justice, policy, or consistency to its own Constitution. These are concluded by the decision of the public authorities of the state. The only inquiry for this court is, does the act violate the Constitution of the United States, or the treaties and laws made under it?" *Carpenter v. Pennsylvania*, 17 How. 456.

The statute of the state does not assume to prohibit insurance companies taking license under it from removing actions on its policies from state to federal courts. It only provides that no insurance company shall be licensed under it, which shall not file an agreement not to remove them. So that the question in *Ins. Co. v. Morse* was not whether the statute was in violation of the right of removal, but whether the voluntary agreement of the insurance company was obligatory upon it. The only question upon the statute before the court was, whether it could operate to give validity to the agreement, held to be otherwise invalid. And it is sufficiently plain that the validity of the agreement, and the validity of the statute requiring the agreement, are entirely distinct questions. The invalidity of the agreement has been determined by the court of last resort on the subject, but the statute remains. And we take it that no provision in the Constitution, laws, or treaties of the United States is violated by a statute of the state prohibiting the license of the state to foreign corporations to do business within it, upon any condition whatever. The right of the state to refuse such license is absolute; and, being absolute, it may be exercised at absolute discretion, not to be questioned or abridged, anywhere, under any pretence. It was within the appellate jurisdiction of the federal court to refuse effect to the agreement as ousting the jurisdiction of the federal courts; but it is not within its jurisdiction to hold foreign insurance companies entitled to license without the agreement. It can hold an insurance company not bound by the agreement when made, as repugnant to the Constitution and laws of the United States; but it cannot excuse the agreement, as a condition precedent to license under the state statute. So far, the statute stands outside of its appellate jurisdiction, — raising a pure question of state policy and economy, in a matter within the absolute pleasure of the state. Conceding the invalidity of the agreement, the statute still prohibits license, within the mere discretion of the state, without the agreement; and the statutory license cannot issue without it. In authorizing voluntary licenses, with absolute right to annex any condition to them, the state may exact agreements morally although not legally binding on the licenses. It may be presumed there is some sense of decency even among corporations. It may be presumed that not every insurance company will voluntarily make such an agreement, as a condition of a voluntary and advantageous license, and then deliberately violate it, even with the sanction of the supreme court of the United States. In any view, such a violation is a scandalous breach of good faith, indicating a disposition to bad faith in all the dealings of the company. And, though the agreement be not obligatory in law, yet has the state a right to trust to it, as obligatory in conscience; and to refuse licenses to all insurance companies refusing to execute it. In that view of it, the federal court has no appellate jurisdiction over the statute; and the declaration that it is unconstitutional was *brutum fulmen*. To that extent, at least, the state retains power over foreign corporations

seeking to do business within it. The statute is indeed inoperative to give validity to the agreement, ousting the jurisdiction of the federal courts. So the supreme court of the United States has decided. But it is operative to prescribe the conditions on which the state, in the exercise of its sovereign authority, sees fit to license foreign corporations within it. That is for this court, not that, to determine. No foreign insurance company need come here under the agreement; coming, every foreign insurance company violating the agreement is guilty of a moral fraud upon the state. And, in upholding the statute to this extent, against the extrajudicial *dictum* of the supreme court of the United States, we may quote in our own behalf the language of one of the great chief justices of that court: "A sanction is claimed to a breach of trust, and a violation of moral principle. In such a case, the mind submits reluctantly to the rule of law, and laboriously searches for something which shall reconcile that rule with what would seem to be the dictate of abstract justice." *Hannay v. Eve*, 3 Cranch, 242.

The provision in sec. 22 of chap. 56 of 1870, requiring the agreement as a condition of license, was alone before the court in *Ins. Co. v. Morse*. And so far we have considered it by itself. But this writ is applied for, not under that section, but under chap. 64 of 1872. And the two statutes, taken together, put the whole subject in a view which was not before the court in that case, and could not properly be in any case of its appellate jurisdiction. The former statute requires the agreement; the latter statute provides for the revocation of any license issued, upon violation of the agreement. And, the agreement being invalid to oust the jurisdiction of the federal courts, the two provisions together are equivalent to one, requiring the revocation of a license issued to a foreign insurance company, upon its application to remove an action on its policy, from a state to a federal court.

The statute extended to these foreign insurance companies the privilege of doing business in this state, on equal footing with domestic companies. Experience showed their power to harass the citizens of the state doing business with them, by removing actions on their policies from courts of the vicinage, to distant and expensive tribunals. Hence the provisions of both statutes. And, conceding to the fullest extent the right of removal of actions commenced, we can see no pretence for questioning the power of the state, in the exercise of its absolute discretion on the subject, to revoke the license of a company exercising the right. The state has power to make its voluntary license subject to forbearance of a right, and revocable upon its exercise. The right may survive the license, but the license cannot survive its exercise. So, grants are sometimes made upon condition to forbear a right. It was for the authorities of the state alone to judge that the exercise of the right is an abuse of the privilege of the license. With that question, the federal courts have no concern. They can hold, as they have, that the right exists impending actions; but they have no jurisdiction over the question whether foreign corporations, exercising the right, shall be permitted by the state to do business within it. That is matter of state policy, state law, state jurisdiction.

The distinction between the validity of the agreement, and the validity of the statute, is readily illustrated. It is quite clear that the secretary of

state takes no authority under the statute, to license a foreign insurance company not executing the agreement. That is a condition precedent to his authority. This court would assuredly refuse to compel him to act in disregard of the statute which confers his authority. And we take it that the supreme court of the United States would hardly claim appellate jurisdiction to review our decision, or to compel a state officer to act officially for the state, in disregard of the letter of his authority, on the ground that the agreement, when executed, is inoperative to oust the jurisdiction of the federal court.

It appears to us to be very plain that the statute of 1870 is a valid enactment; that its validity was not involved in the decision of *Ins. Co. v. Morse*; that its validity, as a limitation upon the issue of licenses under state authority, was not within the appellate jurisdiction of the court; and that the declaration in the opinion that it is repugnant to the Constitution and laws of the United States and therefore void, is but an improvident and erroneous expression of the learned judge who delivered the opinion. With all due deference, we may be permitted to say of it what Lord Mansfield said of a *dictum* of Chief Justice Holt: "That is *obiter* saying only; and not a resolution or determination of the court, or a direct solemn opinion of the great judge, from whom it dropped." *Saunderson v. Rowles*, 4 Burr. 2064.

The opinion proceeds to discuss the relations of foreign corporations to the state in a scope wholly foreign to the judgment in the case, and in a tone inconsistent with decided cases in that court, and therefore, so far, of no authority there or here. It is sufficient for this case that that great tribunal has frequently and uniformly held that the corporations of one state have no right to migrate to another, there to exercise their franchises, except upon the assent of such other state; and that such assent may be granted upon such terms and conditions as the state granting it may think proper to impose. *Ins. Co. v. French*, 18 How. 404; *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 18 Wall. 410; *Ins. Co. v. Massachusetts*, Ib. 566; *Osborn v. Mobile*, 16 Wall. 479.

*Paul v. Virginia* was the case of an insurance company of New York, doing business in Virginia, under a statute of the latter state, prohibiting foreign insurance companies from doing business there, without license to be granted upon conditions precedent. It was decided as late as 1868, and the court uses this language:—

"The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 13 Pet. 519, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corpo-

ration entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens, as, in their judgment, will best promote the public interest. The whole matter rests in their discretion." And this doctrine is expressly affirmed in *Ducat v. Chicago*, a like case in 1870.

The doctrine is so sound in itself, and so many of the decisions of that court on other subjects would be disturbed or subverted by a departure from it, that we feel safe in holding it to be the settled law of the federal supreme court, notwithstanding intimations to the contrary in the opinion in *Ins. Co. v. Morse*; another reason for regarding these as not sufficiently considered, as is apt to be the case with all *obiter dicta*.

V. But if we should be mistaken in all this; if the provision of the statute of 1870 requiring the agreement be unconstitutional; there is another view of the case, in our judgment, conclusive of it.

*Morse v. Ins. Co.* was decided in 1874, and reported in 1875. The legislature of the state has since been in session, and there is no doubt that their attention was called to the decision. Yet, though they have since enacted at least one statute, chap. 300 of 1876, amending the general insurance laws, they have not repealed or modified the provision requiring the agreement. This is a strong confirmation of our view, derived from the statute itself and its history, that the legislature would not have adopted or retained the statute authorizing licenses to foreign insurance companies, without the provision for the agreement. It is not an independent provision, to fall by itself.

The other provisions of the statute in regard to license cannot be executed independently of it. It was evidently designed as a compensation for the provisions authorizing licenses — an inducement to them. And it is the settled doctrine of this court that, if it be unconstitutional, the whole statute authorizing licenses to foreign insurance companies is unconstitutional. *Slauson v. Racine*, 13 Wis. 398; *Lynch v. The Economy*, 27 Wis. 69; *State v. Dousman*, 28 Wis. 541.

In that view of the statute, no license to foreign insurance companies would be authorized by law; the secretary of state would have acted without color of authority in issuing the license in question; the license would give no color of right to the insurance company to do business within the state; and it would be our undoubted duty to compel the secretary to undo an official act, done without authority, an infringement upon the prerogatives of the state, and a usurpation of its sovereign authority.

VI. The return pleads in bar of the peremptory writ, an injunction of the circuit court of the United States for the Western District of Wisconsin, issued upon a bill filed in that court, by the insurance company against the secretary of state, restraining that officer from revoking the license of the state to the insurance company, and the brief of the attorney general takes the position that the federal court had jurisdiction of the bills; and that jurisdiction of the subject matter having first attached in that court, the jurisdiction of that court is exclusive of the jurisdiction of this.

Upon the application to us for the alternative writ, the learned counsel for the relator made a statement, repeated on both arguments without contradiction, which has left a very painful impression on our minds. He stated that as early as July, 1875, the petition for the alternative writ was

filed, and the writ issued, and we think served, in one of the circuit courts of this state; that upon the suggestion of the attorney general, in September, that the petition should, for convenience, be withdrawn from that court and immediately filed in this, the relator's counsel assented, withdrew the petition from the circuit court, and sent it to the attorney general to be at once filed in this court, according to the suggestion; that the relator's counsel understood it to be so filed here, and the alternative writ issued; that it was not so filed; but that in the mean time the proceeding was taken, and the injunction issued in the federal court, of which the relator's counsel had no notice. It does not appear by the record of the proceeding annexed to the return, that the secretary of state or the attorney general appeared in the federal court, or made any objection to the injunction. Indeed, the record implies that there was no such appearance or objection. As the facts, except, perhaps, the last, do not appear of record, we are without power to act upon them; but, if they are correctly stated, the present objection to our jurisdiction to issue the writ appears to us to come with an ill grace from the chief law officer of the state. For it would be a grave encroachment upon the sovereign authority of the state, if state officers could so transfer judicial control over their official action for the state, and the prerogative jurisdiction of this court, to an inferior federal court. But it is quite certain that the federal court has not jurisdiction to bind the state, or to foreclose the authority of the state courts, on behalf of the state, over its own affairs.

As originally adopted, the federal Constitution extended the judicial power of the United States to controversies "between a state and citizens of another state;" vesting in the supreme court of the United States original jurisdiction in all cases "in which a state shall be a party." This grant of original jurisdiction in such cases to that great court appears to have been considered exclusive. Federalist, No. 80; Story's Const. sec. 1682; 1 Kent, 298; *Georgia v. Brailsford* 2 Dallas, 402; *Cohens v. Virginia*, 6 Wheat. 264.

The jurisdiction was probably intended to apply only to cases in which a state should be plaintiff. But it was held to embrace all controversies between states, whether plaintiffs or defendants, and citizens of other states; so far reducing a sovereign state to the condition of a private corporation. *Chisholm v. Georgia*, 2 Dallas, 419. This was probably a surprise, certainly an offence, to most, if not all, of the states. Says Chancellor Kent: "The judicial power, as it originally stood, extended to suits prosecuted *against* one of the United States by citizens of another state, or by citizens or subjects of any foreign state; but the states were not willing to submit to be arraigned as defendants before the federal courts, at the instance of private persons, be the cause of action what it might. The decision of the supreme court of the United States, in the case of *Chisholm v. Georgia*, *supra*, decided in 1793, in which it was adjudged that a state was suable by citizens of another state, gave much dissatisfaction, and the Legislature of Georgia carried their opposition to open defiance of the judicial authority. The inexpediency of the power appeared so great that Congress, in 1794, proposed to the states an amendment to that part of the Constitution, and it was subsequently amended in this particular, under the provision in the fifth article." 1 Kent, 296.

The amendment is in these words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The manifest object of the amendment was to preclude the federal courts from jurisdiction over a state, in any case, at the suit of private parties. And by all rules of construction, the prohibition should apply to all cases in which the interest of a state is so concerned that it ought otherwise to be a party. But the intent and letter of the amendment have been greatly narrowed by the effect given to it by the decisions of the supreme court of the United States.

The Constitution designed that court to be, as it is, a great national tribunal; a court of last resort on all questions of national character; and a court of a dignity and authority unequalled by any tribunal known in modern history, not perhaps excepting the imperial chamber at Wetzlar, to which it has been compared. Federalist, No. 80; Story's Const. sec. 1679; 1 Kent, 296. And yet that august tribunal has no general jurisdiction, but is essentially a court of defined and limited jurisdiction, original and appellate. We speak with profound deference to that court, in saying that it should be matter of surprise to no jurist, to no student of history, that so august a tribunal, so constituted and limited, should have from the beginning proved impatient of the limited scope of its own authority, and that of the inferior federal courts on which its own jurisdiction chiefly rests; gradually and sometimes almost insensibly extending it, and signally illustrating the maxim, *ampliare jurisdictionem*. Its views of federal jurisdiction have always been aggressive. It has but illustrated a general human tendency, a common phase of judicial history, in gradually enlarging the letter of its jurisdiction by construction; until its jurisdiction by implication appears to exceed its jurisdiction by express grant; until it appears to be loaded down and impeded, we might almost say overwhelmed, by excess of jurisdiction, presumably never contemplated by the framers of the Constitution.

And it was, perhaps, hardly to be expected that an amendment to the Constitution, abolishing a jurisdiction originally granted by that instrument to federal courts, would be kindly regarded by so great a court so constituted, or favorably construed for the prohibition and against the jurisdiction. So it has surely proved.

The amendment appears to have been first before the court in *Hollingsworth v. Virginia*, 3 Dallas, 378. The question was the effect of the amendment upon pending suits, and the court "delivered an unanimous opinion, that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects of any foreign state." But a few years later, in a cause in which a state claimed an interest but was not a party, the court used this language:—

"The right of a state to assert, as plaintiff, any interest it may have in a subject, which forms the matter of controversy between individuals, in one of the courts of the United States, is not affected by this amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested. The amendment simply provides,

that no suit shall be commenced or prosecuted against a state. The state cannot be made a defendant in a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant. In this case the suit was not instituted against the state or its treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the court of admiralty, which were admitted to be in their possession. If the proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it was unnecessary to give an opinion; but it certainly can never be alleged that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title." *United States v. Peters*, 5 Cranch, 115. It will be presently seen that the suggestion here thrown out is the seed of great growth of jurisdiction, inconsistent with the spirit of the amendment, if not with its letter.

The amendment appears to have next come before the court in *Cohens v. Virginia*, 6 Wheat. 264. The state had prosecuted the plaintiffs in error criminally in one of her courts, and there was judgment of conviction against them. They sued out a writ of error from the federal supreme court to the state court, against the state; the state being defendant in error in that court. Notwithstanding the amendment, the court claimed jurisdiction of the cause, upon the ground that such a proceeding was not a suit within the meaning of the amendment, though it subjected the state to a judgment in that court, at the suit of a private party. And the court has hitherto adhered to that rule in numerous cases.

In *Osborn v. Bank of the U. S.* 9 Wheat. 739, the court thus states the question: "The direct interest of the state in the suit, as brought, is admitted; and, had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause, until the state was before the court. But this was not in the power of the bank. The eleventh amendment of the Constitution has exempted a state from the suits of citizens of other states or aliens; and the very difficult question is to be decided, whether, in such a case, the court may act upon the agents employed by the state, and on the property in their hands." And the court thus states its conclusion: "It may, we think, be laid down as a rule which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently the eleventh amendment, which restrains the jurisdiction granted by the Constitution over suits against states, is, of necessity, limited to those suits in which a state is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a state by the citizens of another state, or by aliens. The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are

to be considered as having a real interest, or as being only nominal parties." The court then proceeds to show that the officers of the state, who were the parties to the record, were personally liable to the bank, and therefore had a real, personal interest, under the state, indeed, but distinct from the interest of the state; and upon that ground upheld the decree against them.

This is the leading case upon the subject. And it is very distinguishable from the case before us, in which the secretary of state has no interest whatever; is a mere nominal party, the state alone having the whole interest in the subject; a mere shadow of the state, set up for jurisdiction against the body over which jurisdiction is prohibited by the Constitution.

The next case which we find is *Governor of Georgia v. Madrazo*, 1 Peters, 110. That was a case in admiralty, in which the governor of the state intervened in behalf of the state, and the court uses this language:—

"In the case of *Osborn v. Bank of the United States*, 9 Wheat. 738, this question was brought more directly before the court. It was argued with equal zeal and talent, and decided on great deliberation. In that case the auditor and treasurer of the state were defendants, and the title of the state itself to the subject in contest was asserted. In that case the court said: 'It may, we think, be laid down as a rule, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record.' The court added: 'The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.'

"The information of the governor of Georgia professes to be filed on behalf of the state, and is, in the language of the bill, filed by the governor of Georgia on behalf of the state, against Brailsford.

"If, therefore, the state was properly considered as a party in that case, it may be considered as a party in this.

"The bill of Madrazo alleges that the slaves which he claims 'were delivered over to the government of the State of Georgia, pursuant to an act of the general assembly of the said state, carrying into effect an act of Congress of the United States, in that case made and provided; a part of the said slaves sold, as permitted by said act of Congress, and as directed by an act of the general assembly of the said state, and the proceeds paid into the treasury of the said state, amounting to thirty-eight thousand dollars or more.'

"The governor appears, and files a claim on behalf of the state, to the slaves remaining unsold, and to the proceeds of those which are sold. He states the slaves to be in possession of the executive, under the act of the Legislature of Georgia, made to give effect to the act of Congress on the subject of negroes, mulattoes, or people of color, brought illegally into the United States; and the proceeds of those sold to have been paid in the treasury, and to be no longer under his control.

"The case made, in both the libel and claim, exhibits a demand for money actually in the treasury of the state, mixed up with its general



funds, and for slaves in possession of the government. It is not alleged, nor is it the fact, that this money has been brought into the treasury, or these Africans into the possession of the executive, by any violation of an act of Congress. The possession has been acquired by means which it was lawful to employ.

"The claim upon the governor is as a governor; he is sued, not by his name, but by his title. The demand made upon him is not made personally, but officially. The decree is pronounced, not against the person, but the officer, and appeared to have been pronounced against the successor of the original defendant; as the appeal bond was executed by a different governor from him who filed the information. In such a case, where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the court as defendant. This not being a proceeding against the thing, but against the person, a person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause before a decree can be regularly pronounced.

"But were it to be admitted that the governor could be considered as defendant in his personal character, no case is made which justifies a decree against him personally. He has acted in obedience to a law of the state, made for the purpose of giving effect to an act of Congress; and has done nothing in violation of any law of the United States.

"The decree is not to be considered as made in a case in which the governor was a defendant, in his personal character; nor could a decree against him in that character be supported.

"This decree cannot be sustained as against the state, because, if the eleventh amendment to the Constitution does not extend to proceedings in admiralty, it was a case for the original jurisdiction of the supreme court. It cannot be sustained as a suit, prosecuted, not against the state, but against the thing, because the thing was not in possession of the district court.

"We are, therefore, of opinion that there is error in so much of the decree of the circuit court, as directs that the said slaves libelled by Juan Madrazo, and the issue of the females now in the custody of the government of the State of Georgia, or the agent or agents of the said state, be restored to the said Madrazo, as the legal proprietor thereof; and that the proceeds of those slaves, who were sold by order of the governor of the said state, be paid to the said Juan Madrazo; and that the same ought to be reversed; but that there is no error in so much of the said decree as dismisses the information of the governor of Georgia, and the claim of William Bowen."

*Governor of Georgia v. Madrazo* was followed and affirmed in *Kentucky v. Dennison*, *Governor*, 24 How. 66. This was an application for *mandamus*, by the governor of Kentucky against the governor of Ohio, within the original jurisdiction of the supreme court; to enforce the performance of an executive duty by the defendant governor. Of course the *mandamus* could not go to the state, but to its officer only. And the ob-

jection was taken that it was not a case between two states, to give jurisdiction to the court under the Constitution. But the court holds:—

“So, also, as to the process in the name of the governor, in his official capacity, in behalf of the state.

“In the case of *The Governor of Georgia v. Madrazo*, 1 Pet. 110, it was decided that in a case where the chief magistrate of a state is sued, not by his name as an individual, but by his style of office, and the claim made upon him is entirely in his official character, the state itself may be considered a party on the record. This was a case where the state was the defendant; the practice, where it is plaintiff, has been frequently adopted of suing in the name of the governor in behalf of the state, and was, indeed, the form originally used, and always recognized as the suit of the state.

“Thus, in the first case to be found in our reports, in which a suit was brought by a state, it was entitled, and set forth in the bill, as the suit of ‘the State of Georgia, by Edward Tellfair, governor of the said state, complainant, against Samuel Brailsford and others;’ and the second case, which was as early as 1793, was entitled and set forth in the pleadings as the suit of ‘His Excellency Edward Tellfair, Esquire, Governor and Commander-in-chief in and over the State of Georgia in behalf of the said State, complainant, against Samuel Brailsford and others, defendants.’

“The cases referred to leave no question open to controversy, as to the jurisdiction of the court. They show that . . . it has also been settled, that where the state is a party, plaintiff or defendant, the governor represents the state, and the suit may be, in form, a suit by him as governor in behalf of the state, where the state is plaintiff, and he must be summoned or notified as the officer representing the state, where the state is defendant.

“We may, therefore, dismiss the question of jurisdiction without further comment, as it is very clear, that if the right claimed by Kentucky can be enforced by judicial process, the proceeding by mandamus is the only mode in which the object can be accomplished.”

What is said in *Governor of Georgia v. Madrazo*, and in *Kentucky v. Dennison*, of the governor of a state, applies equally to any other state officer, acting for the state *virtute officii*. The question is not one of the dignity of the office, but of the representation of the state, *pro hac vice*. “In the application of this principle, there is no difference between the governor of a state and officers of a state of lower grades. In this respect they are upon a footing of equality.” *Davis v. Gray*, 16 Wall. 203.

The opinion of the court in *Osborn v. The Bank*, and *Governor of Georgia v. Madrazo*, were both delivered by Marshall, C. J.; and the opinion in *Kentucky v. Dennison*, by Taney, C. J.,—two of the most illustrious jurists known in the history of jurisprudence among the great English-speaking common law peoples. Their doctrines were surely well and wisely considered, are entitled to the most profound deference, and not lightly to be overruled. And these cases are in entire accord upon two propositions, both conclusive of the question before us.

1st. That where a suit is prosecuted in a federal court, by a private party, against a state officer, in which the state has a direct interest but cannot be made a party, the officer himself must have an interest or liability in the subject matter, upon which the jurisdiction of the court can attach; and

2d. That where such a suit is prosecuted against a state officer having no such interest or liability, in his official capacity only, to affect a right of the state, the state is the real defendant within the prohibition of the amendment of the Constitution.

These rules are vital. Where there is such an interest or liability of the officer personally, the jurisdiction of a federal court might be held to attach against him personally, upon such interest or liability, without direct violation of the constitutional amendment prohibiting jurisdiction against the state. But when there is no such personal interest or liability of the officer, and the suit is against him in his official capacity only, for the purpose of reaching an interest or liability of the state, then jurisdiction attaches on the interest or liability of the state, not of the officer; the state is the real defendant, and the officer only a nominal defendant; and jurisdiction is as much prohibited as if the state itself were defendant. To hold that jurisdiction could, in such a case, be exercised against the state, in the person of its officer, would be a direct and mere evasion of the constitutional prohibition, which the judges of all courts, federal and state, are sworn to support; which no judicial construction of any court can erase from the paramount law of the land.

The subject matter of *Governor of Georgia v. Madrazo* came again before the court, *Ex parte, Juan Madrazo*, 7 Peters, 627, upon application to file a libel in admiralty against the state. The application was denied; the chief justice saying of it: "It is a mere personal suit against a state to recover proceeds in its possession, and in such a case no private person has a right to commence an original suit in this court against a state."

*Osborn v. The Bank, Governor of Georgia v. Madrazo*, and *Kentucky v. Dennison*, are so closely connected in principle that we have considered them together, a little out of the order of the latter case. Between *Governor of Georgia v. Madrazo* and *Kentucky v. Dennison*, another case came before the court and has its place in the reports, in which the jurisdictional question might have properly arisen. This is *Dodge v. Woolsey*, 18 How. 331. It was the case of a bill filed in an inferior federal court, by a private party, against a tax-collector of the state, to restrain the collection of a state tax. Several questions were raised and passed upon by the court in that case, quite foreign to the question which we are considering. The jurisdictional question before us, arising under the amendment of the Constitution, appears not to have been raised at the bar or considered by the court. The jurisdiction of the federal courts over the subject matter in other respects is discussed; but not the jurisdiction over the state officer, acting officially without interest, within the constitutional prohibition. It appears quite obvious that this question was altogether overlooked. Indeed, the court says of the case of *State Bank v. Knoop*, 16 How. 369: "It rules this in every particular; and to the opinion there given we have nothing to add, nor anything to take away." *State Bank v. Knoop* did indeed involve the questions passed upon in *Dodge v. Woolsey*, but it was a writ of error to a state court, and could not possibly involve the jurisdiction of a federal court in an original suit, against a state officer, acting officially. The oversight is the more to be regretted, because the assumption of jurisdiction in *Dodge v. Woolsey* disregards the two conditions before noticed, as solemnly established in *Osborn v. The Bank* and

*Governor of Georgia v. Madrazo*, subsequently confirmed in *Kentucky v. Dennison*. But the rule applies to it, that a case which overlooks a point cannot be held to overrule cases expressly deciding the very points. And the positive rules of *Osborn v. The Bank* and *Governor of Georgia v. Madrazo* must be held to survive the silence of *Dodge v. Woolsey*. If this were otherwise, the negative authority of *Dodge v. Woolsey*, on the question of jurisdiction, must be taken to be overruled by the positive authority of the later case of *Kentucky v. Dennison*.

Then comes *Davis v. Gray*, 16 Wall. 203, where a receiver appointed in a cause pending in an inferior federal court filed his bill in the same court, against the governor and another officer of a state, to restrain them in executing the law of the state. The question of jurisdiction was raised and discussed by the court. And Mr. Justice Swayne, who delivered the opinion, says of the question:—

“A few remarks will be sufficient to dispose of the jurisdictional objections as to the appellants.

“In *Osborn v. The Bank* these things, among others, were decided:

“(1.) A circuit court of the United States, in a proper case in equity, may enjoin a state officer from executing a state law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant.

“(2.) Where the state is concerned, the state should be made a party, if it could be done. That it cannot be done, is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the state in all respects as if the state were a party to the record.

“(3.) In deciding who were parties to the suit, the court will not look beyond the record. Making a state officer a party does not make the state a party, although her law may have prompted his action, and the state may stand behind him as the real party in interest. A state can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.

“*Dodge v. Woolsey*, *The State Bank of Ohio v. Knoop*, *The Jefferson Branch Bank v. Skelly*, *Ohio Life & Trust Company v. Debolt*, and the *Mechanics' & Traders' Bank v. Debolt*, proceeded upon the same principles, and were controlled by that authority, with respect to the jurisdictional question arising in each of those cases as to the defendants.”

And again, speaking of parties: “We feel no difficulty in disposing of the case as it is presented in the record.”

This case professes to follow *Osborn v. The Bank*; but it is extraordinary that it takes no notice of the essential rule cited from that case, that defendant state officers, to give jurisdiction, must themselves have an interest or liability in the subject matter. And it is more extraordinary still, that, quoting several cases, with at best a very remote bearing on the question, the opinion makes no reference to *Governor of Georgia v. Madrazo*, or *Kentucky v. Dennison*, with both of which the opinion is directly in conflict, as well as with the rule in *Osborn v. The Bank*. And, with all due respect, we think it may be said of *Davis v. Gray*, that, instead of following the well considered and established rules in *Osborn v. The Bank*,

*Governor of Georgia v. Madrazo*, and *Kentucky v. Dennison*, it rather follows, presumably by inadvertence, the blind lead of *Dodge v. Woolsey*, itself an incongruity, sandwiched in the reports between inconsistent decisions.

We cannot think the vital principle established in *Osborn v. The Bank*, or the judgments in *Governor of Georgia v. Madrazo*, and *Kentucky v. Dennison*, overruled by *Davis v. Gray*. These cases are too solemn and of too high authority to be set aside *sub silentio*. We cannot but think that they were overlooked; the learned judge who delivered the opinion, being misled by the unconsidered and unfortunate departure from those cases of *Dodge v. Woolsey*.

*Woodruff v. Trapnall*, 10 How. 190; *Curran v. The State of Arkansas*, 15 How. 304; *State Bank v. Knoop*, 16 How. 369; *Ohio L. & T. Co. v. Debolt*, 16 How. 416; *The Bank v. Debolt*, 18 How. 380; and *The Bank v. Skelly*, 1 Black, 436, cited in the opinion to support jurisdiction in *Davis v. Gray*, were all writs of error to state courts, to be classed with *Cohens v. Virginia*. And their authority for original jurisdiction in, an inferior federal court is not perceived. And it may be said in passing, that the learned judge who delivered the opinion was in error in saying that in *Woodruff v. Trapnall* a writ of mandamus was issued to the proper representative of the state. The judgment of the supreme court of the state was simply reversed in the usual form. So in *Curran v. Arkansas*, the judgment of the state court was reversed; the federal supreme court simply following the state supreme court in holding that such a suit would lie against the state, by her own law, in her own courts.

When the decisions of a state court vary in interpreting state law, the supreme court of the United States makes its own election, which it will follow. *Gelpcke v. Dubuque*, 1 Wall. 175. We may, with profound respect, presume here upon the like right of choice; and we prefer to hold the rules in *Osborn v. The Bank*, *Governor of Georgia v. Madrazo*, and *Kentucky v. Dennison*, as the more authoritative and well considered cases to settle the law of that court, unless expressly overruled. When adjudications so solemn and so well considered are disregarded or forgotten in the court, none of us may presume to say *Indignor*; but surely all of us should recall sounder and safer principles established in that great court, *Quandoque bonus dormitat Homerus*.

And the rules established in *Osborn v. The Bank*, *Governor of Georgia v. Madrazo*, and *Kentucky v. Dennison*, exclude jurisdiction of the federal court of the bill and injunction pleaded by the secretary of state in this case.

Our conclusion would not be different if we were to accept *Davis v. Gray* as overruling the earlier cases, and establishing a different rule. For that case does not go the length,—no case which we have been able to find in that court does,—of holding that the state would be bound, in the exercise of its authority, by the proceeding of the federal court against its officer. Conceding the power of the federal court to bind the officer, as between him and the plaintiff who sues him, the constitutional amendment absolutely prohibits it from binding the state, as against either the plaintiff or its own officer. In such a case the private party seeking his remedy against the officer must be content with that, *valeat quantum*. He can

have none against the state, or binding the state, or binding the officer against the state. Against the authority of the state over its own officer, against the officer's duty to the state, federal process in such a case can avail nothing. It is more than the case of one not bound by a judgment, because not a party. It is not the case of one without the jurisdiction of the court, but of one above the jurisdiction. It is the case of a sovereign state, over which the charter creating the federal courts, for grave political reasons, prohibits jurisdiction in such cases, has abrogated the jurisdiction once improvidently granted. It would be a singular perversion of all judicial rule, to hold that the state could not be bound as a party, but is bound without being a party. And it would be a simple nullification of the constitutional amendment, to hold the state in any way bound by the judgment of a federal court against its officer, at the suit of a private party. That would be, not judicial construction, not judicial stretch of jurisdiction, but judicial revolution.

And it would involve the singular absurdity that, while the original Constitution which expressly gave jurisdiction at the suit of private parties, against a sovereign state, confined such jurisdiction to the supreme court of the United States,—a court worthy of such jurisdiction, if any federal court could be,—the amendment prohibiting such jurisdiction in any federal court would subject a sovereign state, in the person of its officer, and the administration of the state government, to the process of any petty federal court which Congress might see fit to establish, at the suit of any vagabond citizen or corporation of another state, doing business in it.

We abide by the letter and spirit of the Constitution. Unfortunately, many things in its administration are tending toward centralization, which the history and temper of the American people give grave warning might be closely followed by disintegration. The integrity of the Union has been tried. The integrity of the states is on trial. Much rests upon the moderation and forbearance of the federal courts; as much perhaps upon the firmness of the state courts refusing to abdicate state authority in state matters, to assumption of federal jurisdiction. We will faithfully try to do our part. In refusing at the last term to assume a jurisdiction properly belonging to the federal courts, we had occasion to say and we now repeat:—

“It is perhaps unfortunate that the federal Constitution left any ground for concurrent jurisdiction of the federal with the state courts. It has led to some mischievous confusion of adjudication, and some vicious usurpation of jurisdiction, by both federal and state courts. In this day, this is a great and growing evil, and we propose in this state, for the sake of judicial order and of the integrity of the federal and state governments, to do what we may toward confining the courts of the state to state jurisdiction, and the courts of the United States to federal jurisdiction.” *Bromley v. Goodrich, supra.*

VII. Had the federal court had jurisdiction of the bill and injunction pleaded by the secretary to bind the state, it could not avail him in this case, because the license in force when the bill was filed and the injunction issued, has expired by its own limitation; and it is only to that license that the injunction can relate. The injunction is indeed very loose and general; literally broad enough to restrain the secretary from revoking any

license to the insurance company for any cause, for all time. But it must receive a reasonable construction, and be confined to the things and the condition of things existing when issued. When the license existing at the time the bill was filed expired, the injunction was spent. The secretary might have found ground for refusing a new license, *dehors* all matters pleaded in the bill; or the legislature might have repealed or modified the statute authorizing the license. The new license, therefore, created a new relation with the state, though it may have been but the renewal of an old relation which had expired by limitation; and the federal court which issued the injunction could hardly have intended, certainly had in any view no authority, to bind the defendant for all time, outside of the actual condition of things pleaded in the record, or in new relations between the parties. Even federal jurisdiction, where it attaches, is not so comprehensive or prospective.

VIII. The writ in this case will issue, in the right of the state, at any hazard to its officer. We apprehend, however, that there will be none. The state officer is bound to obey the state authority. And if any one, to be found within the state, should molest any officer of the state for obeying the process of this court, in the administration of the state government, and the fact should be properly brought before us, we think we should be able to afford ample and summary remedy.

We regard this matter as a grave attempt to baffle state authority in the administration of state affairs, in a way to be a temptation for the use of a somewhat injudicial adjective. And we are thoroughly in earnest, as is our duty under our oaths, to enforce state authority, in state affairs, over state officers, and on foreign corporations who come here *ex gratia* of state law, and then set the law at defiance. We mean to suffer no trifling here. The writ must be so framed that the secretary not only shall promptly revoke the existing license, but shall refrain from granting any other license to the insurance company for three succeeding years; and that he certify the revocation to this court, within twenty-four hours after service of the writ upon him.

Let the writ issue at once, in accordance with this opinion.

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## CIRCUIT COURT OF THE UNITED STATES.—DISTRICT OF CALIFORNIA.

[MAY, 1876.]

REVISED STATUTES AND ACTS PASSED AT SAME SESSION.—AMENDATORY BANKRUPTCY ACT OF JUNE, '74.—CORPORATION.—PETITIONING CREDITORS.—ALLEGATION OF CHARACTER OF CORPORATION.

### IN RE OREGON BULLETIN PRINTING CO.

The Revised Statutes must be taken to be an act passed on the first day of December, 1873, and all acts of later date, passed at the same session, are to be treated as subsequent acts.

The amendatory Bankruptcy Act of June 22, 1874, is to be regarded as amending and supplementing the Revised Statutes, notwithstanding the date of its passage and its reference to the Act of 1867.

The same proportion of creditors must, under existing laws, join in a petition in involuntary bankruptcy against a corporation as is required in case of a natural person.

The petition against a corporation must show that the corporation is a "moneyed, business, or commercial corporation."

THE facts are set forth in the opinion.

*Joseph Simon*, for plaintiff in error.

*H. Y. Thompson & Geo. H. Durham*, contra.

SAWYER, J. In September, 1875, certain creditors filed a petition in bankruptcy in the district court against the Oregon Bulletin Printing and Publishing Company, a corporation organized under the laws of Oregon, in which they alleged that they constituted one fourth in number of the creditors, and held one third in amount of the aggregate provable debts of the corporation, the amount due them exceeding four thousand dollars; that within the preceding six months the corporation had committed several acts of bankruptcy, for that being insolvent, said corporation made sundry payments to certain creditors named with intent to give such creditors preference; and in another instance procured certain of its property to be taken on legal process with like intent, and praying that for these causes the corporation be adjudged a bankrupt.

The corporation answered the petition, among other things denying that the petitioners constituted one fourth in number of its creditors, or that they held one third of its aggregate debts, and filed a separate statement in writing to the same effect.

The petitioners moved to strike out these denials as irrelevant, on the ground that the provisions of section 39 of the Bankrupt Act of 1867, as amended by section 12 of the Act of 1874, required one fourth in number of the creditors, representing one third in amount of the aggregate debts of the bankrupt, to join in the petition, do not apply to corporations. The district judge sustained that view, and struck out both the denials of the answer, and the corresponding allegations of the petition relating to the number of creditors and the amount of indebtedness. The corporation seeks a reversal of this ruling; and the question is, whether under the statute, as it now stands, a corporation can be adjudged a bankrupt upon the petition of a single creditor, or any number less than one fourth of the whole, and without regard to the amount of the debts.

The district judge, in an elaborate and very able opinion, which merits, and which has received, the most careful and respectful consideration, held the affirmative of the proposition. 13 N. B. Reg. 200. On the other hand, *In re Leavenworth Savings Bank*, the district judge of the second district of Kansas adjudged the point the other way; and this ruling was affirmed on a petition for review by Mr. Circuit Judge Dillon in a well-considered opinion, notwithstanding the opinion of the district judge in this case, which was cited at the hearing. 3 Cent. L. Jour. 207. So far as I am aware, these are the only adjudications directly upon the point; and as there is no authoritative decision upon the question by the supreme court, it will be necessary to examine the question anew. Certainly no more important question has arisen under the bankruptcy act, and it deserves the most deliberate examination.



The Revised Statutes, which embodied in a different arrangement the provisions of the Bankrupt Act of 1867, and repealed the latter as a separate and independent act, were actually passed on the same day with the Act of June 22, 1874, purporting to amend and supplement the Act of 1867 so repealed. Which of the two acts passed first in point of time on that day does not appear. It is necessary to a proper discussion of the question presented to ascertain and keep in view the relation of these two statutes to each other. Section 5595 provides that "The foregoing seventy-three titles embrace the statutes of the United States general and permanent in their nature, in force on the first day of December, one thousand eight hundred and seventy three," &c. And the following sections repeal the previous acts. It is plain that, whatever the result, the intent was in this act to express without change of sense, in a different form and arrangement, all the general statute law of the United States as it existed on December 1, 1873; to substitute this arrangement and expression for prior *acts as of that date*; and to adopt that date as the dividing line by which its relation to all other legislation subsequent to December 1st should be determined. In accordance with this intention, section 5601 provides that "The enactment of the said revision is not to affect or repeal any act of Congress passed since the first day of December, one thousand eight hundred and seventy-three, and all acts passed since that date are to have full effect as if passed after the enactment of this revision; and so far as such acts vary from or conflict with any provision contained in said revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith."

Thus, by express enactment, the Revised Statutes, for the purpose of determining their relation to other legislation at the same session, are to be regarded as though passed on the 1st day of December, 1873; and all other acts passed subsequent to that date, although in fact passed before the Revised Statutes, are to be treated and enforced as subsequent statutes, repealing the Revised Statutes so far as they are inconsistent therewith. Under these provisions, the Act of June 22, 1874, purporting to amend and supplement the Bankrupt Act of 1867, must be regarded as passed subsequent to the passage of the Revised Statutes, and although referring in terms to the Act of 1867, must be construed as referring to the provisions of that act, as carried into and expressed — or, in the language of the act, "*embraced*" — in the corresponding sections of the statutes; and as amending and supplementing the provisions of the statutes relating to bankruptcy as therein found expressed. This must be so, for the Revised Statutes expressly repeal the Bankrupt Act of 1867; and the Act of 1874 being construed as subsequent to the Revised Statutes, on any other hypothesis, so far as it is amendatory of the Act of 1867, would simply amend, that is to say, change, the reading of certain portions of an act already repealed, and no longer in force, without reenacting it into a law. The result would be, the amendment only of parts of a repealed statute without reenacting it into a law, while the corresponding provisions of the Revised Statutes would remain in force unchanged, except in those parts expressly repealed by section 21 inconsistent with the amendments, *and as to those parts so repealed, there would be no statute at all in force.* This clearly could not have been the intention of Congress. The amend-

atory and supplementary act, therefore, must be construed as amending the provisions of the Revised Statutes, corresponding to and substituted for the sections of the Act of 1867 purported to be amended in the amendatory act; and the other provisions of said act as supplementing the provisions of the Revised Statutes under the title "bankruptcy." Any other construction would result in nothing but the grossest absurdity. So construed, section 12 of the Act of 1874, purporting to amend section 39 of the Act of 1867, must be construed as amending sections 5021, 5022, and 5023 of the Revised Statutes.

The decision of the question under consideration then must depend upon the construction put upon the Revised Statutes as thus amended. Section 5122 provides, that "The provisions of this title shall apply to all moneyed, business, or commercial corporations, and joint-stock companies." This provision is comprehensive, and embraces every provision of the title "bankruptcy," except those which are inconsistent with some express or necessarily implied limitation, or which, from the inherent character of corporations, cannot in the nature of things be made applicable; as for example, a corporation cannot in the nature of things be arrested or imprisoned. Section 5023 provides, that "An adjudication in bankruptcy may be made on the petition of one or more creditors, the aggregate of whose provable debts amounts to at least two hundred and fifty dollars." This is one provision of the title—is general and comprehensive—and is applicable to corporations, under the provisions cited from section 5122, unless clearly repugnant to some other provision expressly relating to corporations; and there is no such provision, unless it be found in the clause, "or upon the petition of any creditor of such corporation or company," in section 5122. Are these two provisions necessarily, or by any reasonable construction, upon a consideration of the whole title, and the general policy indicated in it, repugnant? In my apprehension they are not. It must be borne in mind, that the principles upon which the act proceeds, and all the details and specific provisions relating to matters of bankruptcy, are prescribed in the other sections; and that the provisions of section 5122 relating to corporations are intentionally brief, general, and incomplete, specifically providing merely for inherent differences between corporations and natural persons, and referring to the other provisions of the title for particulars unaffected by such inherent differences. Thus, it was necessary to indicate in what way the corporate will should be manifested in a voluntary petition, as questions might arise upon this point (and did in fact arise under the act, as plain as it seems to be; *Lady Bryan Co.* 1 Sawyer, 350); and it was accordingly provided, that it should be by "petition of any officer of such corporation, or company, duly authorized by a vote of the majority of the corporators at any legal meeting called for the purpose." It was not left to the trustees then, but the interests of the stockholders were thus carefully guarded by this provision. Having mentioned by whom the petition should be filed in case of a voluntary bankruptcy, it was natural and proper to indicate *the party* to file the petition in the correlative case of an involuntary bankruptcy, and it accordingly named as *the party* "any creditor of such corporation or company." In both cases it indicated *the person* to apply, without either referring to the amount in which the corporation must be

indebted to constitute an "act of bankruptcy," or the amount to which the party must be a creditor to entitle him to petition. These were specified in other provisions made applicable by the first clause of the section, and it was not necessary to repeat them here. So as the officers of a corporation are not the corporation, and it is sometimes necessary to operate upon them in order to reach the corporation, another provision in the section, to meet inherent differences between corporations and natural persons, makes certain enumerated provisions of the title applicable to natural persons also applicable to the *officers* of the corporation. So, also, as corporations have no need of homesteads or other property usually necessary to the subsistence and existence of natural persons, who were debtors, and their families, and as its stockholders are also usually personally liable for its debts, it is provided in this section, that "no allowance or discharge shall be granted to any corporation," and accordingly that "*all* its property and assets shall be distributed" as "in the case of natural persons." These are the points of difference briefly indicated, and all other provisions not specifically enumerated are expressly made applicable by the comprehensive introductory words of the section. Suppose section 5023 had read, "An adjudication of bankruptcy, either against a *natural person or corporation*, may be made on the petition of one or more creditors, the aggregate of whose provable debts amounts to at least two hundred and fifty dollars," section 5122 reading as it does now, "upon the petition of any creditor of such corporation," would these two clauses have been repugnant? Could they not have both stood together, one indicating only the relation of the party to the bankrupt necessary to give him the proper *status*, and the other the amount of the indebtedness which should be requisite to justify troubling the courts and the parties with the proceeding? Could there be any doubt under such provisions of the statute that the creditor or creditors of a corporation must be creditors to the aggregate amount of two hundred and fifty dollars, to entitle them to an adjudication in bankruptcy against the corporation? The question does not appear to me to admit of argument. The provisions would be construed together, and while one provision would authorize a creditor to petition, the other would require him to be a creditor for the amount of, at least, two hundred and fifty dollars. But the provisions as they now stand in the Revised Statutes are just as broad and comprehensive. Section 5023 is general and covers every case. The interpolation of the hypothetical phrase, "either against a natural person or a corporation," does not in any degree enlarge the scope of the provision. If the two provisions are not repugnant in the supposed case, they are not so as they are. Besides, the provision of section 5023 was a part of section 89, in the Act of 1867, which was introduced by the words, "any person," and these provisions had direct reference to the word, "person." The provision is "Any person who, &c., . . . shall be adjudged a bankrupt on the petition of one or more of his creditors the aggregate of whose debts provable under this act shall amount to at least two hundred and fifty dollars," and section 48 provided that "the word 'person' shall also include 'corporation,'" so that under this provision defining the word "person," as used in the act, the statute did, in fact, read as though written, "Any person or corporation . . . shall be adjudged a bankrupt on

the petition of one or more creditors the aggregate of whose debts provable under this act shall amount to at least two hundred and fifty dollars," exactly, in effect, as I have supposed section 5023 to read in this opinion for the purpose of illustration, and the several provisions of that act must be so read for the purpose of giving a proper construction. So reading it, there can be no doubt, that effect can be given to both provisions, and they are not repugnant. But the Revised Statutes only broke this section up into three sections, without any intention in any way to change the sense. Again, if, under section 5122, a creditor can have a corporation adjudged bankrupt without regard to the amount due him, for the same reason, the corporation may be adjudged bankrupt without being indebted to the amount of three hundred dollars, and without committing any act of bankruptcy as defined in the act at all. The section says, "Any officer properly authorized may petition," or that a creditor may petition, without saying that the corporation must be indebted to the amount of three hundred dollars, or in any other amount. It does not say that the mere filing of a petition, either by the corporation, or a creditor, shall constitute an act of bankruptcy on the part of a corporation; nor does it say what shall constitute an act of bankruptcy. We must go elsewhere to find what constitutes an act of bankruptcy on the part of a corporation, or else we must imply that filing a petition by an authorized officer, whether there is any indebtedness or not, or the filing of a petition by a creditor to the amount of a dollar is an act of bankruptcy. If we go back to section 5021, we find that a provable indebtedness exceeding the amount of three hundred dollars is *an essential element in an act of involuntary bankruptcy*; and by section 5014, a like amount of indebtedness is an essential element in an act of voluntary bankruptcy. In the latter case "the filing of such petition" by a person owing the prescribed amount (see first clause) "shall be an act of bankruptcy" (last clause). Unless the provisions of these sections apply, there is nothing prescribing what shall constitute, in either case, an act of bankruptcy on the part of a corporation. If they do apply, then there must be a provable indebtedness to an amount exceeding three hundred dollars; for that amount of indebtedness is just as much an element in an act of bankruptcy under those sections, as any other element therein mentioned. Again, under section 5023 (so, also, section 39 of the Act of 1867), an adjudication might be made "on the petition of one or more creditors the aggregate of whose provable debts amounts to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed. This proviso is also omitted in section 5122, and the time within which the petition is to be brought is no more a part of the "manner provided in respect to debtors," than is the amount of indebtedness due the petitioning creditors, and we have no greater right to incorporate this proviso into section 5122, than we have the other half of the same sentence relating to the amount of two hundred and fifty dollars. It is all in a single sentence. In the case of a corporation, is there to be no limit as to the time when the proceeding is to be brought? If not, why the distinction? I do not suppose that any one would be bold enough to maintain, that the provisions under consideration would all, or any of them, be inapplicable to partnerships, because in

section 5121 the phrase is, "or on the petition of any creditor of the parties," without adding the clause to the amount of "at least two hundred and fifty dollars." Yet these particulars are no more included in the provision of the latter part of the section,—"in all other respects the proceedings against partners shall be conducted in the like manner, as if they had been commenced and prosecuted against one person alone," than they are in the similar provision in regard to corporations in the next section. I do not perceive why the same reasoning which would make the limitations inapplicable to corporations would not, also, make them inapplicable to partners. Besides section 5122 embraces joint stock companies, as well as corporations, and these, in law, are only partnerships composed of natural persons. Why should there be any distinctions in these particulars between different kinds of partnerships, or between natural persons acting alone, or in connection with others in different forms of partnerships?

In my judgment, after a careful consideration of the various provisions of the act, the specific provisions of section 5122, so far as they go, are controlling in respect to corporations; but that all other provisions of the title of an additional character omitted to be mentioned in this section not repugnant to any of its express provisions, and not in the nature of things intrinsically inapplicable are made applicable to corporations by the introductory clause of the section. "The provisions of this title shall apply to all moneyed, business, or commercial, corporations," read in connection with the words of definition in other sections; and that the amount of indebtedness exceeding three hundred dollars, necessary to constitute an act of bankruptcy; the amount, two hundred and fifty dollars that must be due to a creditor in order to entitle him to file a petition; and the proviso, as to the time when the petition must be filed in the case of natural persons, are all applicable to corporations; that these matters having been provided for by other provisions made applicable by the first clause in section 5122 and other provisions, there was no occasion to repeat them in that section, and they were accordingly omitted, with other omitted particulars. But if one of these provisions is inapplicable to corporations all must be, and one creditor, to no matter how small an amount, may control the matter without regard to the interests of other creditors or stockholders, without any limitation as to time when the proceedings are to be instituted, and in a case where the aggregate indebtedness of the corporation is too insignificant to justify troubling the parties or the courts with the litigation.

Upon the construction adopted, the provisions of the bankrupt act operate uniformly, and are harmonious in all particulars where there are no inherent characteristic differences between corporations and natural persons, and different provisions are made only to meet such differences. This is what we should expect to find in a statute.

If I am right in the construction given to the Revised Statute unaffected by the amendment of 1874, there can be no further difficulty in the case, for the amendment is clearly as broad and comprehensive as the unamended statute. If wrong, the amendment contains inherent evidence either that Congress supposed my construction to be the correct one and acted upon that view, or else, that it intended the amendment to be broader

in its scope, and to include corporations in all its provisions not in the nature of things inapplicable.

That the amendment was intended to apply to corporations whatever the proper construction of the former act, to my mind seems clear.

Section 5013 of the Revised Statutes, like section 48 in the Act of 1867, provides, that "In this title the word 'creditor' shall include the plural also; . . . the word 'person' shall, also, include 'corporation.'" The statute has itself defined the word "person," for the purposes of the act, not for some sections only, but wherever it occurs; and that definition includes "corporation." "Creditor" in section 5122 means also creditors, and "person" in 5021, corporation. Under this definition we are authorized *and required* to read the words, "any person," in the amendments of 1874, "any person or corporation." Read in connection with the provisions relating to an act of bankruptcy of the character alleged in the petition in this case, omitting the parts inapplicable, the section as amended in 1874 provides as follows: "Any person *or corporation* residing and owing debts as aforesaid, who after the passage of this act . . . being insolvent . . . shall make any payment . . . of money . . . or procure his property to be taken on legal process with intent to give a preference to one or more of his creditors, . . . shall be deemed to have committed an act of bankruptcy, and subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt *on the petition of one or more creditors, who shall constitute one fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one third of the debts so provable: Provided, that such petition is brought within six months after such act of bankruptcy shall have been committed.*" Reading the section in this way, as we are authorized and required to do, the language of the section is not open to any other construction than that which makes the whole applicable to corporations as well as to natural persons. The section is unbroken, and is not divided and cannot be divided so as to make one part applicable to natural persons only. Either *the whole* section must be applicable to corporations, *or no part of it is*, and in the latter case, *there is no provision which declares what act of a corporation, or that any act constitutes an act of bankruptcy.* The word person in this amendment is not accidentally or inadvertently, but deliberately, brought within the definition of that word as given in section 5013; for in a subsequent part of the same section, Congress in repeated instances specifically mentions a class of corporations as being some of the persons embraced in the word person, as used in the introduction of the section. Thus, "That any person . . . *who being a bank or banker . . . has fraudulently stopped payment . . . or who being a bank . . . has stopped or suspended, and not resumed payment . . . or who being a bank . . . shall fail,*" &c., . . . "shall be deemed to have committed an act of bankruptcy, and subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, *who shall constitute one fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one third of the debts so provable.*" The words "who" and "bank" refer directly to the word "person" as their antecedent, showing that a bank, at least, was intended to be included in the word, "person," and by express provisions, that a bank

can only be thrown into bankruptcy on the petition of one fourth in number of its creditors, who represent one third in amount of its provable debts. That the word "bank," as used, means, or at least includes, incorporated banks, does not seem to admit of discussion. The term is general, without anything to indicate any limitation on its meaning. It includes all banks of whatever character. It is the very word in universal use when a corporation for banking purposes is intended, and rarely, if ever, used in speaking of a natural person — the word banker being the more appropriate term, and the one ordinarily used to designate natural persons engaged in banking business. Both terms are used in the statute, showing that Congress intended to include every species of banks. The word "bank" was not used in prior statutes, while banker was, which is all that is necessary to designate natural persons acting as bankers. Showing that in this act, at all events, *banking corporations were intended to be included*. The word is not used for the purpose of extending the meaning of the word "person," but is introduced in defining a particular act of bankruptcy, as though, as a matter of course, a bank was included in the word "person." It is manifest from this specific recognition of a class of corporations as being some of the persons embraced in the words "any person," in the beginning of the section, that Congress intended to use that word in this section in the broad and comprehensive sense indicated by the definition in section 5013; and used in that sense, there is no escaping the conclusion that the subsequent provision relating to the number of petitioning creditors, and the amount of debts that must be represented by them, are expressly made applicable to corporations. And again the section provides, that "the provisions of this section shall apply to *all cases*" — not all cases of natural persons, or all cases other than those of corporations, or to some cases — but to "*all cases of compulsory or involuntary bankruptcy commenced since the first day of December, eighteen hundred and seventy-three, as well as to those commenced hereafter. And in all cases commenced since the first of December, eighteen hundred and seventy-three, and prior to the passage of this act as well as to those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors*" be denied by a debtor, by statement in writing to that effect, require him to file forthwith a full list of his creditors, &c. I am unable to perceive how corporations can by any reasonable or even possible admissible construction be excluded from the operation of the clause under consideration. If by expressly defining the terms used so as to include corporations, then by expressly naming a class of corporations as embraced within the terms so used and defined; and immediately in connection therewith employing the comprehensive words "in all cases," which must include cases against corporations as well as natural persons; and further providing in terms without limitation, that "the provisions of this title shall apply to" corporations, Congress does not express an intention to include corporations, it is difficult to see how such an intention could be manifested in any way short of enacting a separate statute relating alone to corporations, which should embrace all the provisions intended to be applicable, without any reference to any other statute or provision relating to natural persons, or other matters.

If I am right in my view of the amendment of 1874, it must prevail,

whatever the construction put upon the provisions of previous acts, since it is the last expression of the legislative will, and it repeals all inconsistent provisions wherever found, as well those of section 5122, if those are inconsistent, as of 5021, 5022, and 5023.

In the very able opinion of the district judge, it is said, inadvertently, I think, "the statute provides that a 'person' shall be entitled to a certain allowance out of his property and under certain circumstances to a discharge of his debts." Now in those two cases the word "person" does not include a corporation, because the statute, section 5122 Revised Statutes, expressly provides that no "allowance or discharge shall be granted to any corporation," &c. I do not find the word "person" used at all in the statute in the connection here referred to. The "allowance out of his property" is provided for in section 5045 of the Revised Statutes, and 14 of the Act of 1867, and the discharge in Revised Statutes section 5114, and 32 of the Act of 1867. In all these cases the word used is "bankrupt" and not "person," so that the argument suggested falls with the erroneous hypothesis. I find no instance in the act where the word "person" would not appropriately include a corporation, as the statute says it shall, except one or two where in the nature of things it could not apply, as where an arrest is provided for; and no instance in which, if construed to include a corporation, it would, upon any reasonable construction, make it repugnant to any other provision of the statute. If there is any such instance, it has escaped my notice.

It is further said that the definition of the word "person" in section 5013 of the Revised Statutes is limited to the word "person" as used "in this title;" that the amendment of 1874 is an independent act, which is no part of "this title," and therefore, that it does not embrace the word "person" as used in the Revised Statutes. The title is "Bankruptcy," and in contemplation of the Revised Statutes at the time of their supposed passage it embraced all the statute law upon the subject of bankruptcy. In the beginning of this opinion, it is held that the amendatory provisions of the Act of 1874, for reasons stated, although referring by name and section to the repealed Act of 1867, must be construed as amending the corresponding sections of the Revised Statutes. Upon this view, the amendatory provisions fall into the place of the sections of the Revised Statutes amended, as amendments, and thus become a part of the title of the Revised Statutes amended, and are brought within the operation of the defining section 5013. Section 12 of the Act of 1874 revises and embodies the entire subject matter of sections 5021-22-23 of the Revised Statutes, and upon well settled principles of construction takes the place of and repeals all those sections. Besides section 21 expressly repeals all acts and parts of acts inconsistent with the provisions of the Act of 1874. If the amendments do not become a part of the Revised Statutes, as amendments thereto, they simply amend a repealed statute, which is no longer in force, and the corresponding provisions of the Revised Statutes being repealed, also, there is no statute in force under which any adjudication in bankruptcy can be had. In my judgment the amendatory sections fall into the Revised Statutes and become parts of the title amended.

It seems impossible, by any reasonable construction of the amendment of 1874, to take a bank, though a corporation, out of the operation of the



provisions under consideration, yet the creditors of a bank are usually far more numerous and more difficult of ascertainment, especially in the case of banks of issue, than those of any other class of corporations. If banks are not excluded from the operation of the provisions relating to the number of creditors and amount of debts represented necessary to entitle them to file a petition, I can see no possible reason for excluding any other class of corporations, and in my judgment none are excluded. No distinction between the different classes of corporations is anywhere indicated. If Congress should make any distinction between corporations and natural persons in the particulars in question, we should expect to find some sound and obvious reason for its action. If no sound reason can be found, and the point is doubtful, we ought to conclude that no distinction is intended. No reason has been suggested and none occurs to me that appears to my mind to be sound. It also appears to me to be a mistaken supposition that a modern corporation is in effect destroyed by an adjudication in bankruptcy, — that, being stripped of its property, it can acquire no more. Such seems not to be the doctrine of the books. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543. If so destroyed, a corporation created by the act of one sovereignty is annihilated by the act of another sovereignty. In many of the United States, perhaps generally, in respect to recently formed moneyed, business, and commercial corporations, — the class embraced in the bankrupt act, — the stockholders are personally liable for the indebtedness of the corporation. The corporation is but an instrument in the hands of the stockholders; and the stockholders themselves, being personally liable, are the ultimate debtors, as well as the parties ultimately enjoying the benefits of the organization. The ultimate effects of an adjudication in bankruptcy against such corporations, as to the excess of indebtedness over assets, reach natural persons. It may be greatly to the interest not merely of the stockholders, but the great mass of creditors, that there should be no adjudication against the corporation, even though insolvent. It is fair to presume that the stockholders, and three fourths in number and two thirds in value of the creditors, will act in such manner as they suppose their common interests dictate, as well in the case of corporations as where the bankrupt and primary debtor is a natural person; and I can perceive no sound reason why a less number than one fourth in number and one third in value of the creditors should control the proceeding against the wishes and interests of the great majority in one case more than in the other. The corporation, though insolvent, may repair its capital, and the interests of all concerned may require this to be done. It is in fact sometimes done, as the very remarkable recent instance of the Bank of California, so notorious as to become a part of the public history of the country and of the financial world, shows. The bank stopped payment. Its reputed indebtedness exceeded twenty millions, — generally understood to be several millions in excess of its assets. It was therefore largely insolvent. Its capital stock had all been paid up and absorbed. Yet, by the forbearance of its creditors and the energy of its stockholders, its capital stock was repaired, as this court had occasion judicially to know, by levying new assessments in pursuance of authority given by the statutes under which it was organized, upon the stock already fully paid up, and its business resumed under such auspices as to give promise of a future no

less brilliant than its past. Had it been in the power of a small part of the creditors to have thrown this institution into bankruptcy, and it had been exercised, it would doubtless have severely shaken the finances of the Pacific coast, if not of the whole country, and have proved a great public calamity. So, also, it is understood that after the sweeping public calamity of the Chicago fire several of our insurance corporations, whose resources had become largely impaired, repaired their capital in a similar way, and continued on in a prosperous career. These striking examples show that, at least under our system of personal responsibility, corporations as well as individuals have strong recuperative powers, and if not otherwise trammelled than natural persons, may in like manner recover from the effects of extraordinary misfortunes. To my mind these examples afford a strong argument against any good grounds for a distinction between modern moneyed, business, and commercial corporations and natural persons in the particulars under consideration. The policy of the amendment on this point may be good or bad. With this the courts have nothing to do; but if good for one, it seems to me to be good for both. I am, myself, unable to find any solid ground for a distinction in this respect between this class of corporations and natural persons, and I am also unable to find anywhere in the statute the distinction claimed, or any evidence of an intent to make such a distinction.

The case of *The New Lamp Chimney Co. v. The Ansonia Brass & Copper Co.* 13 N. B. Reg. 385, has been cited by respondents' counsel as an authority in favor of the views of the district judge and opposed to the view taken in this opinion, and by Mr. Circuit Judge Dillon *In re Leavenworth Savings Bank*, 14 Nat. B. R. 92. There is one clause in the opinion of Mr. Justice Clifford in the enumeration of the points of the provisions of section 37 of the Act of 1867 which seems at first view to favor the construction which it is cited to sustain. It is as follows: "Second. The petitions for involuntary bankruptcy may be made and presented by any creditor without any specifications as to the number of the creditors or the amount of their debts." This, however, was not a point adjudged, nor did the point arise in the case. There was no question in it as to whether, in the case of involuntary bankruptcy of a corporation, a single creditor, without regard to the amount due him, is entitled to file a petition. There is nothing in the case to indicate that this point was either argued by counsel or carefully considered by the court. In illustrating the argument upon the point presented, the learned judge refers to other provisions of the act, and among other things recites the several points as specified in section 37. He nowhere says that the provisions of other sections relating to the amount of indebtedness do not apply to corporations, but only that this section is "without any specification as to the number of the creditors, or of the amount of their debts," which is manifestly true, but without saying what the effect on it of other provisions is. It is quite a different question, whether, in determining the right of a creditor to petition, this provision simply stating the relation of the party to the corporation necessary to give him the proper *status* — a right to an adjudication — or simply designating the party, shall be supplemented by the other provisions providing for the required amount of indebtedness, not inconsistent with the clause, so far as it goes, made applicable by other

express provisions, and therefore not necessary to be repeated here. Such casual observations in the course of an argument, even where more in point than in this case, are never regarded by the supreme court or the judge who makes them, as authoritative. The reports are full of instances where dicta of a far more pertinent and decided character are wholly disregarded. I have attempted to show in the first part of this opinion that the other provisions as to amount being additional and not inconsistent are made applicable by the general comprehensive introductory clause of section 37, and by other defining clauses of the act referred to. And this view seems to me to be sustained also by the other observations of Mr. Justice Clifford immediately preceding and following the clause quoted from his opinion. Besides, the learned judge in that same opinion distinctly lays down the rule of construction. We are not to hunt for repugnances, but rather aim to harmonize the various provisions of the act. And there is certainly no repugnancy between the clause in section 37 which named a creditor as *the person* who is to petition, and the clause in section 39 which *fixes the amount* for which he must be a creditor to entitle him to petition; and considering both provisions as applicable, harmonizes best with all the provisions of the act, and with the idea of a uniform system, so far as in the nature of things it can be made uniformly applicable. The learned justice in that case found no difficulty in harmonizing provisions far more distinctly repugnant. But it must be borne in mind that the case in the supreme court arose under the Act of 1867, and the observations of the learned justice were made upon that act as it existed before its amendment. Whatever the proper construction of that act, it does not necessarily control the present act. There seems to be no mistaking the scope of the amendment of 1874, and if found inconsistent with anything in section 5122, or elsewhere in the Revised Statutes, it must prevail, as being the last expression of the legislative will. The case of *The New Lamp Chimney Co. v. The Ansonia Brass and Copper Co.*, *supra*, was also cited by counsel in the *Leavenworth Savings Bank* case, and could not, therefore, have been considered by the learned judge who heard it as inconsistent with the construction put by him upon the amendment in question of 1874.

For these reasons, in addition to those expressed by Mr. Circuit Judge Dillon in the *Case of the Leavenworth Savings Bank*, I hold that to authorize an involuntary adjudication in bankruptcy against a corporation under the statute as amended in 1874, the petitioning creditors must constitute one fourth thereof, at least in number, the aggregate of whose debts provable under the act amount to at least one third of the debts so provable.

There is no allegation in the petition in this case, that the corporation is either a "moneyed, business, or commercial corporation," and the character of the corporation can only be inferred from the name and the averment that its place of business is at Portland. The petition would undoubtedly be held bad on demurrer. No objection was taken until the issues formed were about to be submitted to the jury, when the point was raised for the first time in the form of an instruction to the jury asked of the court. It was with hesitation denied, on the ground that it came too

late. Whether this ruling was correct or not the petition should be amended in this particular.

The adjudication in bankruptcy, and the order striking out the allegations in the petition, and corresponding denials of the answer relating to the number of petitioning creditors, and amount of debts represented by them, must be reversed and the case remanded for further proceedings, and it is so ordered.

### SUPREME COURT COMMISSION OF NEW HAMPSHIRE.

(To appear in 56 N. H.)

NEGLIGENCE OF MUNICIPAL CORPORATION. — DAMAGE FROM STOPPAGE OF SEWER. — NOTICE.

#### ROWE v. PORTSMOUTH.

A city, having power by statute to construct public sewers, and to demand and receive pay from adjoining owners for liberty to enter their private drains into such sewers, is responsible for negligently suffering them to occasion a nuisance to the estates of such adjoining owners, if the nuisance does not result from the original plan of construction, and could be avoided by keeping them in proper condition.

In maintaining such public sewer, a city is bound to use that degree of care and prudence which a discreet and cautious individual would use if the whole loss or risk was to be his alone.

A city will not be liable for injuries caused to individuals, by an obstruction in such public sewer not placed there by its own officials or by authority of the city government, until after actual notice of such obstruction, or until, by reason of the lapse of time, actual notice may be presumed.

CASE, to recover damages sustained from a flow of water into the cellar of the plaintiff's house from the defendants' common sewer. Plea, the general issue. The case was referred to a referee, under the statute, who reports the following facts as proved: Prior to the month of July, 1872, the defendants for more than twenty years had a common sewer leading from High Street down through Hanover Street by the plaintiff's dwelling-house, and emptying into the North Mill Pond, and the plaintiff's cellar was drained by a private drain leading into the defendants' common sewer, of right. In 1867 a new tile drain was laid by the plaintiff in place of her old one of wood, which was discontinued, and said new tile drain led into the defendants' sewer. In 1867 the defendants built a new common sewer in place of their old one, which was discontinued, of cement stone pipe, one foot in diameter, laying the same outside of the old sewer, nearer to the plaintiff's dwelling-house, and, in consequence, cut off all the private drains leading into the old sewer, and connected them with the new sewer, including the plaintiff's drain; that the defendants, in laying said new sewer a short distance below the place where the plaintiff's drain entered it, found a water-pipe, one inch in diameter, running across the proposed course of their sewer at right angles, and they cut their sewer-pipe so as to let it down over said water-pipe, so that said water-pipe passed through

the centre of said sewer-pipe. It is provided by ordinance of said city "that the city councils shall have power to construct drains and common sewers through highways, streets," &c., "and may require all persons to pay a reasonable sum for the right to open any drain into any public drain or common sewer."

In the month of July, 1872, by reason of a lady's parasol or sunshade floating down said sewer and catching on said water-pipe, said sewer became obstructed and choked up, so that July 4, after a shower, the water flowed back from said obstruction through the plaintiff's drain into her cellar, causing her damage and annoyance; and so, likewise, at three different times thereafter during the month of July, at the last of which times, by reason of there being a very heavy shower, and by reason of the said defendants' common sewer having become more choked and obstructed at said water-pipe, the plaintiff's cellar was nearly filled with mud and water, her provisions and produce destroyed, and the cellar and house damaged. The plaintiff each time notified the city marshal, who lived in her neighborhood; but it did not appear in evidence whether or not the marshal notified any other city officer until the last time, when he notified the mayor and one of the aldermen, and thereupon the defendants proceeded to examine their said sewer, and found and removed the obstruction aforesaid. Said obstruction would not have happened had said water-pipe not been allowed to run through the defendants' said sewer; but said sewer, as constructed, was sufficient for the purpose of carrying off the water had said obstruction not occurred as above stated. There was no evidence to show in what manner said parasol or sunshade entered said sewer. Upon the foregoing facts the referee found that the defendants were guilty in manner and form as the plaintiff had declared against them, and assessed damages in the sum of \$253.80.

Upon the return of said report the plaintiff moved for judgment thereon in her favor for the amount found by the referee, and the court *pro forma* granted the motion, to which the defendants excepted.

The questions arising on the foregoing statement of facts and ruling of the court were transferred to this court by Stanley, J.

*Frink*, for the plaintiff.

*Hodgdon*, for the defendants.

SMITH, J. The defendants raise three questions upon the report of the referee: (1) That no action will lie against a city for neglect to build or repair a sewer; (2) that if such action will lie, a city is answerable only for neglect to use ordinary vigilance and care to keep its sewers open and free from obstruction; and (3) that the defendants did not receive seasonable notice of the obstruction to prevent the injuries which the plaintiff has received.

By ch. 44, sec. 9, Gen. Stats., it is provided that "city councils shall have power to construct drains and common sewers through highways, streets, or private lands, paying the owners such damages as they shall sustain thereby, said damages to be assessed by the mayor and aldermen in the same manner and with the same right of appeal from their decision as in case of the laying out of highways; and may require all persons to pay a reasonable sum for the right to open any drain into any public drain or common sewer." This section is an exact reenactment of section 21 of

the act to establish the city of Portsmouth, approved July 6, 1849, under the authority of which the defendants must have rebuilt their sewer in Hanover Street in the year 1867, the General Statutes not taking effect till January 1, 1868. The statute authorized and empowered the defendants to construct public sewers, but did not impose that duty upon them. It was optional with the defendants whether they would or would not take the benefit thus conferred upon them. This authority the defendants accepted when they accepted their charter in 1848, under the provisions of section 28; and it needs no argument to show that a city which constructs sewers under the authority of a statute, virtually accepts the power therein conferred, and will not be admitted to allege the contrary. This case, therefore, is not to be distinguished from *Child v. Boston*, 4 Allen, 41, upon the question of acceptance by the defendants of the statute conferring the authority to construct sewers. When, then, the defendants made their election by accepting the Act of 1849, and by executing the powers therein granted, and also granted by the General Statutes, and received pay from the plaintiff for opening her drain into their public sewer, the question arises whether they are liable to her for injuries sustained by her by reason of their neglect to keep their sewers in proper repair.

Under what circumstances a municipal corporation will be held liable to an individual suffering injuries from the neglect of such corporation to perform a public duty, was very fully discussed by Perley, C. J., in *Eastman v. Meredith*, 36 N. H. 284. In that case it was decided that though a town-house, which was erected by the town, was so defectively constructed that when a town-meeting was held in it the floor broke down and a voter was thereby injured, yet he could not maintain an action against the town to recover damages for the injury. But the learned chief justice remarks: "Grants are sometimes made to particular towns or cities of special powers not belonging to them under the general law; and there is a class of cases in which towns and cities have been held liable to civil actions for damages caused by neglect to perform public duties growing out of the grant of such special powers, — as the power to bring water by an aqueduct for public use by those who pay a compensation for it, to light the place with gas on the same terms, or to make and maintain sewers at the expense of adjoining proprietors. Thus, in *The Mayor, &c. of New York in error v. Furze*, 3 Hill, 612, the city was empowered by special act to lay down and maintain sewers, and charge the expense upon owners and occupiers of houses and lots intended to be benefited; and it was held that an individual might maintain an action against the city to recover damages for a private injury which he had suffered from neglect of the city to keep the sewers in proper repair. The distinction between the liability of towns and cities for neglect to perform public duties growing out of the powers which they exercise under the general law, and their liability when the duty arises from the grant of some special power conferred on the particular town or city, is recognized or explained in *Bailey v. Mayor, &c. of New York*, 3 Hill, 531."

Judge Perley further says, page 293: "In such cases the special powers thus granted are not held by the particular town or city under the general law, and as one of the political divisions of the country. The

public duty grows out of the special grant of power, and though held and exercised by a town or city, the nature of the power granted is the same as if a like power had been conferred on a private corporation created to answer the same public object; and the cases above referred to hold the town or city liable to a civil action for neglect to perform a public duty arising from the grant of the special power in the same way, and, as I understand them, upon the same grounds and reasons as private corporations are held, which are clothed with the same powers and bound to the performance of the same public duties. So far as I have had opportunity to examine this class of cases, they appear to go upon the ground that the special power, though no direct pecuniary profit may be derived from it, is granted as an immunity and peculiar privilege for the benefit of the particular town or city, and is accepted, as in the case of a private corporation, upon the implied condition of performing the public duties imposed by and growing out of it. *Henley v. Lyme Regis*, 1 Bing. N. C. 222; *Mears v. Wilmington*, 9 Ired. 73; *Mayor, &c. of New York v. Bailey*, 2 Den. 456."

It is well settled that a private action cannot be maintained against a town, or other *quasi* corporation, for a neglect of corporate duty, unless such action be given by statute. *Riddle v. Proprietors of Locks & Canals*, 7 Mass. 187; *Mower v. Leicester*, 9 Mass. 247. "This rule of law, however, is of limited application. It is applied, in case of towns, only to the neglect or omission of a town to perform those duties which are imposed on all towns without their corporate assent, and exclusively for public purposes, and not to the neglect of those obligations which a town incurs when a special duty is imposed on it with its consent, express or implied, or a special authority is conferred on it at its request. In the latter cases, a town is subject to the same liabilities for the neglect of those special duties to which private corporations would be if the same duties were imposed, or the same authority were conferred on them, including their liability for the wrongful neglect as well as the wrongful acts of their officers and agents." *Bigelow v. Randolph*, 14 Gray, 541.

*Child v. Boston*, 4 Allen, 41, is a case much in point, where it was held that sewers when constructed become the property of the city, and the duty of keeping them in repair devolves on the city; and the city is responsible for negligently suffering them to occasion a nuisance to the estates of the citizens whose private drains enter into them, if the nuisance does not result from their original plan of construction, and could be avoided by keeping them in proper condition. The plaintiff's drain entered the defendants' common sewer, which had its outlet in the south bay at the depth of some feet below high water. By means of a waste weir, the sewer was constructed to discharge into the empty basin in the back bay when the outlet into the south bay was closed by the tide, and the water in the sewer had risen high enough to reach the waste weir. The proprietors filled in against the sewer in the back bay, thereby preventing the discharge through the waste weir, and the plaintiff's premises were flooded in consequence. Hoar, J., remarked: "Here a special authority was conferred and accepted, involving important relations to individual proprietors of land, and entire control of an easement of such a nature that negligence might not only deprive those interested of a benefit which it

was designed to afford, and for which they had paid, but produce consequences actively and directly pernicious. The duty to keep the sewer free from obstructions was a ministerial duty, and the defendants were liable for negligence in its exercise to any person to whom their negligence occasioned an injury."

Judge Cooley, in his work on Constitutional Limitations, page 248, says: "The grant by the state to the municipality of a portion of its sovereign powers, and their acceptance for these beneficial purposes, is regarded as raising an implied promise on the part of the corporation to perform the corporate duties; and this implied contract, made with the sovereign power, enures to the benefit of every individual interested in its performance. In this respect these corporations are looked upon as occupying the same position as private corporations, which, having accepted a valuable franchise on condition of the performance of certain public duties, are held to contract, by the acceptance, for the performance of those duties." The authorities are very unanimous in support of this doctrine, and are cited on page 248 of Mr. Cooley's work.

As to the second and third questions raised by the defendants, the rule in such cases is stated in *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, to be, that "a city is bound to exercise that care and prudence which a discreet and cautious individual would or ought to use if the whole loss or risk were to be his alone." In *Hume v. The Mayor, &c. of New York*, 47 N. Y. 639, it is said: "The city authorities are not bound to be experts, or skilled in mechanics and architecture, and can only be held to the extent of reasonable intelligence and ordinary care and prudence." *Rockwood v. Wilson*, 11 Cush. 221. In *Johnson v. Haverhill*, 35 N. H. 74, which was an action against the town for an injury resulting from an alleged defect in a highway, it was held that the question of negligence on the part of the town does not arise except incidentally, as it is involved in the question whether the defect exists, and this latter question may depend upon the manner in which the defect originated, and the circumstances of its continuance. In such case the question of negligence is a material inquiry. And where an obstruction exists by reason of inevitable accident, without fault or negligence on the part of any person, it is not an obstruction within the meaning of the statute unless the town had notice of it, express or implied, and reasonable opportunity, by the exercise of proper care and vigilance, to have removed it before the accident occurred. It is well settled, that a municipal corporation is not liable for injuries caused to individuals by obstructions on the highway not placed there by its own officials or by authority of the city government, until after actual notice of their existence, or until, by reason of the lapse of time, it should have had knowledge, and therefore actual notice may be presumed. *Hume v. New York*, *supra*, 646; *Colley v. Westbrook*, 57 Me. 181; *Hunt v. Brooklyn*, 35 Barb. 226; Cooley, page 249.

The case does not show that the referee did not apply these rules in weighing the evidence laid before him, and in coming to the conclusion which he reached. We cannot say, as matter of law, from the facts presented by the report, that the defendants did not act with the care and prudence that a discreet and cautious individual would if the whole loss or risk were to be borne by him alone. There is evidence tending to show



that the thing which caused the obstruction in the sewer had been there for such a length of time that notice to the defendants must be presumed. But these were questions of fact, to be found by the referee according to the particular circumstances of this case; *Johnson v. Haverhill, supra*; and it is to be presumed, in the absence of any evidence to the contrary, that he applied the law correctly to the facts.

CUSHING, C. J. The case of *Eastman v. Meredith* was very elaborately and carefully considered by the late Chief Justice Perley. From that case, and the authorities cited by my brother Smith, it seems to me well established that this is one of that class of cases in which a corporation would be liable at common law for a neglect of its duty.

Some question has been made in the argument about the sufficiency of the notice to the city of the defect in the sewer, and it is claimed that the city marshal was not the proper officer to receive the notice. In the case of *Howe v. Plainfield*, 41 N. H. 135, which was an action for damages occasioned by a defect in a highway, the defendants offered to show that the selectmen had no notice of the defect. The testimony was excluded, and it was held to have been rightly excluded, — the court putting the matter upon the ground that, if the defect had existed for a sufficient length of time to give reasonable opportunity to ascertain and repair it, the town was liable, whether the selectmen had notice, express or implied, of its existence or not. The true theory of the law seems to be, that, in matters of this kind, every corporator ought to interest himself in taking notice of defects and bringing them to the knowledge of the authorities, and that whenever the jury is in condition to say that the corporation ought to have taken notice, it will be held liable. I think we must infer that the referee found, from the notice to the city marshal, which tended to give notoriety, from the length of time which had elapsed, and from all the circumstances, that the defendants had been guilty of neglect. I think, therefore, there should be judgment for the plaintiff on the report.

LADD, J. I, also, think there should be judgment on the report for the plaintiff. Certain facts were reported by the referee, for what purpose does not very clearly appear, and judgment was rendered by the court below for the plaintiff in accordance with the general finding of the referee. The defendants excepted to the order for judgment against them. I understand the ground they take to be, first, that there was no evidence from which the referee could legally find that the damage was caused by any want of reasonable and ordinary care on the part of the city with respect to the sewer; and, second, that if there was such evidence, still they are not liable, according to the doctrine of *Eastman v. Meredith*, 36 N. H. 284.

The first position is certainly without foundation. It is entirely clear that there was evidence from which the referee might well find fault and negligence in the original construction of the sewer, and negligence in not removing the obstruction before the injury happened.

The second point is undoubtedly one of more intrinsic difficulty. The defendants were not bound by law to construct the sewer, and herein the case differs entirely from that of an injury caused by a defect in a highway. They were, however, authorized to construct it, and voluntarily undertook that service. The plaintiff's cellar was drained into the sewer

"of right," as the case finds; so there is no pretence that her legal rights had been forfeited or impaired by her own act. It does not appear whether this right to drain her cellar into the common sewer was of such a character that she could compel the defendants to keep up the sewer for that purpose, nor whether the right was obtained by the payment of a reasonable sum to the city, as provided by Gen. Stats. ch. 44, sec. 9; but, in the view I take of the case, neither of these things is material. It is material that she did not, without right, open her drain into the sewer.

As to the application of *Eastman v. Meredith*, it appears to me the cases are not parallel. There it was held, that where a building, erected by a town for a town-house, was so imperfectly constructed that the flooring gave way at the annual town-meeting, and an inhabitant and legal voter, in attendance on the meeting, received thereby a bodily injury, he could not maintain an action against the town to recover damages for the injury.

The decision was placed entirely on the peculiar nature of the obligation of a town to provide a safe place in which to hold town-meetings. That duty is not imposed by statute, nor by contract. It is not an enterprise undertaken by the town for gain. It is at most a public or political duty, and the right of the citizen that it shall be properly performed is a public or political right.

The court say: "We regard the present case as one of new impression. We have heard of no earlier attempt in this state to maintain an action against a town for a private injury suffered by a citizen of the town from neglect of the town to provide him with safe and suitable means of exercising his public rights, and we are not informed of any case in which such an action has been maintained in any other state."

Nearly the whole of the elaborate opinion of the court is occupied with showing the distinctions between that case, and cases bearing a very strong resemblance to the present.

The question, whether municipal corporations in this country, and corporations in England having some of the powers and charged with some of the duties usually exercised by municipal corporations here, are liable for negligence, carelessness, or misfeasance, both in the performance of their legal duties and the doing of voluntary acts within the scope of their authority, has been much considered by the courts on both sides the Atlantic; and the decided weight of modern authority is, that in this respect they stand like private individuals or corporations. The English cases on this subject are very thoroughly and carefully reviewed by Blackburn, J., in *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93. That was an action against the Mersey Docks Board of Trustees, a corporation created by act of parliament, with power to build docks at Liverpool and secure dock rates, which rates they were bound by the statute to apply wholly to the maintenance of the docks and the payment of a very large debt contracted in making them. The plaintiff's vessel, while entering one of the docks, ran upon a bank of mud which had been suffered to accumulate at the entrance of the dock, and was damaged. It was held that the principle on which a private person, or a company, is liable for damages occasioned by the neglect of servants, applies to a corporation which has been intrusted by statute to perform certain works,

and to receive tolls for the use of those works, although those tolls, unlike the tolls received by the private person or the company, are not applicable to the use of the individual corporators, or to that of the corporation, but are devoted to the maintenance of the works, and, in case of any surplus existing, the tolls themselves are to be proportionately diminished. This case, decided in 1866, shows most clearly the state of the law in England on this point at the present time, and is very much in point.

There was evidence here from which the referee might find want of due care in the construction of the sewer, and that the damage happened by reason thereof.

In *The Mayor, &c. of New York v. Bailey*, 2 Den. 433, it was held that a municipal corporation is responsible for the negligence or unskilfulness of its agents and servants, when employed in the construction of a work for the benefit of the city or town, subject to the government of such corporation. The action was for injury occasioned by the negligent and unskilful construction of a dam on the Croton River, being part of the public works built pursuant to a statute for supplying the city with pure and wholesome water.

In *The Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, the corporation of the city of Rochester, having power to cause common sewers, drains, &c., to be made in any part of the city, directed a culvert to be built, for the purpose of conducting the water of a natural stream which had previously been the outlet through which the surface water of a portion of the city had been carried off. A freshet having occurred, the culvert, in consequence of its want of capacity and the unskilfulness of its construction, failed to discharge the waters, so that they were set back upon the factory of the plaintiffs, and injured their property situated therein. Held, that the city corporation was liable for the damages. And the doctrine was laid down, that an ordinance of a city corporation, directing the construction of a work within the general scope of its powers, is a judicial act for which the corporation is not responsible; but the prosecution of the work is ministerial in its character, and the corporation must therefore see that it is done in a safe and skilful manner.

There was also, in the present case, as already suggested, evidence from which the referee might find negligence in not removing the obstruction from the sewer before the injury occurred; and my opinion is, that this also furnishes legal ground upon which the award of the referee should be sustained.

The case of *The Mayor, &c. of New York v. Furze*, 3 Hill, 612, is in point. It was there held that the corporation of the city of New York are bound to repair the sewers, &c., constructed by them; and, if an inhabitant be injured by reason of their neglect in this particular, he may maintain an action against them for his damages.

Another strong case of the same description is *Child v. Boston*, 4 Allen, 41, where the city was held responsible for negligently suffering the common sewers to occasion a nuisance in the estates of the citizens whose private drains enter into them.

A large number of cases bearing in the same direction may be found in *Shearman & Redfield on Negligence*, secs. 120, 144, 151, 579.

The point as to want of due care and skill in the original construction was decided by this court in the recent case of *Gilman v. Laconia*, 55 N. H. 130.

I think the defendants were bound to the exercise of ordinary care and skill, both in constructing and maintaining the sewer, and that, for any injury which happens to the estate of a citizen from a failure in that respect, they are responsible.

*Judgment on the report for the plaintiff.*

### SUPREME COURT OF PENNSYLVANIA.

(To appear in 29 P. F. Smith.)

NEGLIGENCE. — RAILROAD. — RUNNING TRAINS AT HIGH RATE OF SPEED IN CITY. — INJURY TO INFANT.

#### PENNSYLVANIA RAILROAD CO. v. LEWIS.

1. A child about nine years old was sent by his mother, who resided in Harrisburg, near defendants' railroad, on an errand across the road; whilst on the track he was killed by an engine going westward. There were iron works and houses for the hands on the opposite side of the road at that point, which was in the outskirts of the city; and the hands of the works and other persons were frequently crossing the track about the place. East of where the boy was struck was a curve, which prevented the engineer from seeing him till within too short a distance to stop the train after he was seen. There was no ordinance of the city limiting the rate of running trains at that point. There was evidence that the train was running at a high rate of speed. *Held*, that whether the train was running at a rate of speed which was safe and prudent under the circumstances, was for the jury.
2. It is not common prudence or ordinary care for trains to enter the outskirts of a city at a dangerous rate of speed, although the people have no right to go on the railroad track.
3. Although persons on a railroad track are trespassers, regard must be paid to the habits, character, condition, and circumstances of people living in a city and immediately on the line of a railroad.
4. The commonwealth by its police power may regulate positive rights when for the safety, protection, and welfare of the people; and the speed of trains through towns and cities may be regulated by ordinance.
5. When it is determined by the jury on the facts submitted to them that the rate of speed of a train is incompatible with public safety under the circumstances of the place, the rights of a company, even on its own track, are qualified by the law of the public good.
6. The court charged: "If the boy (being on the track) had sufficient judgment and discretion to know his danger, and did not exercise the ordinary care that one of his age and maturity should, he was guilty of such negligence as would prevent him from recovering," &c. *Held* not to be error.
7. There was evidence in this case of contributory negligence by the parents as to exposing their son to danger, and submitted with proper instructions.
8. *Philadelphia & Reading Railroad Co. v. Hummel*, 8 Wright, 375, distinguished.

ERROR to the court of common pleas of Dauphin County, of May term, 1875, No. 55.

This was an action on the case, brought September, 10, 1870, by Daniel Lewis and Margaret his wife against the Pennsylvania Railroad Company, for causing the death of their son, Edward Lewis, a child eight years and six months old, through the negligence of defendants' servants.

The parents lived near Lochiel Iron Works, in the city of Harrisburg, a short distance from defendants' railroad track; on the 22d of November, 1869, the child was sent by his mother on an errand to an aunt on the other side of the track; whilst on the track he was struck by a passenger train of the defendants' moving west and killed.

By an ordinance of the city of Harrisburg, passed in 1862, the speed of railroad trains within the city was limited to seven miles per hour; at that time and up to 1868 the southeastern boundary of the city was Hanna Street; and the place where the accident occurred was, prior to 1868, outside of the city. In that year the city limits were extended beyond Hanna Street; nothing was done to extend the ordinance beyond Hanna Street, until, by the Act of April 9, 1869, the limits of the city were still further extended, and the whole territory was made subject to the same ordinances, &c., as those by which the city was then governed. The accident happened at a point within the city limits at the time of its occurrence.

The case was tried December 14, 1874, before Henderson, J.

Margaret Lewis, the mother, testified, that "about noon on the 22d of November, 1869, she directed her son to go to his aunt's; the boy left the house as directed; she did not see him again till he was brought home dead; the father was not in the house at the time; he was at work at the Lochiel Mill, where he was employed; the aunt lived at the mill, which was half a mile west of the plaintiff's house." The aunt's house was on the other side of the railroad.

Daniel Balsley testified, that some time before the accident, he had built a house for the Lochiel Company at their mill; by order of that company he made a partition in it; and a small part of the house was used as a station; the defendants had no ticket agent there; the accommodation train stopped there. "The Lochiel Iron Company had a flag there. I put a private crossing at this station to get sand from the river. The water-closets of the mill were on the other side of the railroad from the mill. This private crossing was used by the Lochiel Company to get the sand over, and in going to the water-closets. In 1869 there was only one row of forty houses between Lochiel and McCormick's Furnace; the distance between the two furnaces was about five hundred yards. There were a considerable number of houses from McCormick's to Harrisburg, and manufactories also; there was a curve below the station-house; there were forty-eight houses below the Lochiel Mill; there was a siding below the mill; there was a very long coal-bin alongside the road, on the east side; they were up within ten or twelve feet of this crossing; coal-bin belonged to Lochiel Company; I could see an approaching train one hundred and fifty yards from coal-bin; in 1869 there were two tracks there; bin came within eight feet of the track; the siding did not interfere in looking down the track; we could see over gondola cars, but could not see over high cars on the siding; the Lochiel Company ran a cart road from the back road to the sta-

tion, but it was not safe; when the accident happened the boy was about fifteen feet above the crossing, on the railroad; the boy lay, as near as I could tell, about the centre of the brick house called the depot, on the track. . . . This road, called the back road, after crossing the railroad, goes up through McCormick's property to Harrisburg; this road was used by everybody; I saw this accident; I was standing a little above the brick house, about fifteen feet from the railroad; I heard the whistle sounding very loudly, and I ran and saw the pilot strike the boy; he was on the right hand track coming up, and the train was coming in the same direction; a freight was going east at the same time on the other track; I was attracted by the 'danger whistle' of one of the locomotives, but cannot say which; all the work I did was at the expense of Lochiel; neither I nor they had any connection with the Pennsylvania Railroad Company; my opinion that the train was running at the rate of twenty-five miles an hour, is formed from simply looking at the train of cars running along the railroad. The length of Lochiel Mill is three hundred and one feet; the whole of it is west of the cart-road; the front of the station is fifteen feet from the front of mill."

There was evidence, by a number of witnesses, that the railroad track in the vicinity of the place of the accident was travelled generally by the people, especially since the building of the Lochiel Mill, because it was a shorter way than on the public road; the ties were worn smooth by the travel.

For defendants, Christian Hoffmaster testified: "I was engineer on mail train; it left Philadelphia at 7.50; schedule time at Harrisburg was 12.45; it reached Lochiel at 12.35 or 12.37, on time; the train was in order, and had chain-brake on; there is no better brake in use; the brake was in good order; the road-bed was in good order. . . . As I came around the curve, before reaching Lochiel, I saw a boy coming down from the mill towards the railroad; I blowed the whistle, but he took no heed to it; he walked right on the track in front of train and turned up towards Harrisburg; I did all I could to stop the train, but could not; the engine struck the boy and knocked him over on the other track; I applied the brake, and broke the chain in doing so; the boy, when I first saw him, was forty or fifty feet from me; the bell rang and I whistled; I had whistled before I reached the curve; the boy was five or six yards away from us when he stepped upon the track; the boy could not have been saved if the brake had not broken; I could not have done anything more than I did do to save the boy; I do not think he could have been saved if we had had the air-brake; it was not invented at that time; I examined the brake; it was a clean brake, and good iron; the speed of the train, at the time the boy was struck, was from fifteen to eighteen miles an hour; we shut off steam at the bridge below Lochiel Mill—three hundred or four hundred yards below; its schedule time is about twenty-one or twenty-two miles an hour; a train would slack up in three or four hundred yards from the shut-off to about fifteen or eighteen miles an hour; I think we had six cars. . . . We entered the city at Hanna Street at seven miles; we had no knowledge that it extended further east than that; we slackened up because we were coming into the city limits at Hanna Street."

There was other evidence that the brake on the train at the time of the accident was the best then in use; it would not stop a train running at fifteen or eighteen miles an hour in sixty feet; running at seven miles an hour a train could not be stopped in fifty feet. There was evidence, also, that Hoffmaster was a first-class engineer, of long experience, one of the best in the employ of the defendants.

In rebuttal, the plaintiff gave evidence that Hoffmaster, when before the coroner's inquest, testified, that at the time of the accident the train was running at the rate of from twenty to twenty-five miles per hour.

At the request of defendant the court withdrew from the consideration of the jury all that part of the evidence relating to the permissive use of the track of defendants' road by the public in the vicinity of the place of the accident.

The following are defendants' points with their answers:—

1. Parents owe protection to their children. The plaintiffs' testimony in this case showing that they permitted the boy to go on the railroad, the plaintiffs failed in performing their duty to the deceased and cannot recover.

Answer. "If the plaintiffs permitted the boy to go on the railroad track, the law of this point is correctly stated, but we do not recollect any evidence to show such permission. It is true, the boy would have to cross the railroad in going to his aunt's, but we cannot say to you that a boy of the age of this one would require his parents to be with him in crossing the railroad, or to have a protector for that purpose. We submit to you to say, under the evidence, whether they failed to perform their duty to the deceased boy. If they did, and their negligence contributed to his death, then they cannot recover."

2. Knowingly to allow a boy eight years of age to go on a railroad track, where trains of cars are continually passing and repassing, is such negligence in his parents as will prevent them from recovering in an action brought by them for loss of service, and the uncontradicted testimony showing this negligence here, the verdict must be for the defendant.

Answer. "We answer this in the affirmative as a proposition of law, but do not say that the uncontradicted testimony establishes the fact as stated; you will determine the facts involved in this point."

3. The fact that the boy was killed where he was, is presumptive evidence that he was unprotected and exposed by his protectors; and as their negligence contributed to his death, they cannot recover for loss of service.

Answer. "We have already said that if the negligence of plaintiffs contributed to the death of the boy, they cannot recover; but we cannot say that he was 'unprotected and exposed by his parents,' or that the fact that he was killed where he was, on the railroad, was presumptive evidence that he was, in the eye of the law, unprotected and exposed by his protectors, so as to attribute to them that negligence which would defeat a recovery in this action. And we also refer you to the answer to the first point of the defendant, and to the general charge, for the qualification of this point."

4. It is the duty of parents at all times to shield their children from danger, and this duty is the greater where the danger and risk are immi-

nent. The uncontroverted proof here being that the parents of the deceased worked and lived close to the railroad tracks, and knew of the running of the trains every few minutes, and of the running time of the mail train west, the plaintiffs, by their own fault, contributed to the accident by which their child was killed, and cannot recover.

"We answer the proposition of law in this point in the affirmative, and refer to you the question of fact, whether the plaintiffs contributed to the accident by which their child was killed."

5. The law determines precisely the extent of parental duty. Its standard is not a shifting one; and as there has been no performance of it at all in this case, the verdict must be for the defendant.

Answer. "We cannot say there was no performance of parental duty in this case; and repeat, as we have already said, that whether there was contributory negligence on the part of the plaintiffs is, under all the evidence in this case, for the jury. We decline to say that your verdict must be for the defendant."

6. The defendant has the lawful right to the unobstructed and exclusive use of its tracks, except at public crossings; and if persons go upon the tracks at other places, they go where they have no lawful right to be, and if accidents ensue therefrom, the railroad company is not responsible.

"We answer this point in the affirmative."

7. If the deceased came upon the railroad track in front of and so near the running engine, that no efforts could be made by those in charge of the train sufficient to prevent the accident, there can be no recovery. There being no question here as to these facts, the verdict must be for the defendant.

"We answer this point in the affirmative, unless you find that defendant was guilty of negligence in running its train; and if you so find, then there may be a recovery, unless you determine, under the instructions already given, that there was such contributory negligence as to defeat the recovery."

9. Upon the whole evidence of this cause the law of the case is with the defendant, and the court is requested to give binding instructions to the jury, that the plaintiffs cannot recover.

Answer. "We decline to withdraw this case from the jury."

The court charged: . . . "The question naturally arises, is the defendant liable by reason of the negligence of its agents in running this train on the day this boy was killed? Was it owing to the negligence of defendant that he was killed? And here I withdraw from your consideration all the testimony offered, on the part of the plaintiffs, to prove that the public were accustomed to use the track, at this point and in this neighborhood, as a passage way, by sufferance of the Pennsylvania Railroad Company. This testimony you must discard entirely from your minds, in the consideration of the evidence. It did not establish the fact proposed in the offer. The Pennsylvania Railroad Company is just as much entitled to the free and uninterrupted enjoyment of its track at this particular place, as at any other along the entire line of its road. It would be cruel and wicked to expose the men, women, and children of that neighborhood to the dangers of trespassing upon this railroad track, upon the groundless supposition that they had acquired a right of way or a



right so to use the track, by the sufferance of the defendant; and it would be unjust and positively dishonest to hold the company responsible for injury to persons who knowingly trespass upon the track, and take the risk and consequences upon themselves.

"This collision happened within the limits of the city of Harrisburg, near the Lochiel Iron Works. On the part of the plaintiffs, it is alleged that the defendant's train was running at the rate of about twenty-five miles; that it was an unusual rate of speed, reckless, and dangerous to the lives of citizens living in this part of the city. The defendant answers, and attempts to prove, that the train was running at its usual rate of speed, was on a good track, with the best brake in use, and was in perfect order, and everything done that could be done to save the life of the boy. *Here there is a discrepancy in the testimony as to the distance the boy was from the engine and the place where he first stepped on the track — whether at the crossing, or further up, opposite the mill. How this was is for you. Was the train running at a safe and prudent rate of speed?* Was everything done that could be done by defendant's agents under the circumstances? Or was the rate at which the train was approaching and running, dangerous and reckless? We think, and perhaps you will have no difficulty in concluding, that when the boy was seen upon the track, everything possible was done to save him. Then you have to determine whether there was negligence or want of ordinary care in running the train, taking into consideration the fact, that it was along a part of the road within the city limits, which was, to some extent at least, occupied by manufactories and dwelling-houses; the curve around which the train came, and the distance of the place where the accident occurred from the curve. And in this connection I call your attention to the fact, that the engineer swears that he whistled before reaching the curve, and let off steam, in which he is corroborated by the fireman on the same train.

"We instruct you, that the *locus in quo* — the place where the boy was killed — was not within the provisions of the ordinance of the city of Harrisburg, limiting the running of trains within the city limits to seven miles an hour. . . . This ordinance was passed in 1862. The city limits were extended by the Act of 1866, but this act did not extend the city ordinances over the new territory taken in. The Lochiel Iron Works were not within the city limits when the said ordinance was passed. It is then contended, that the Act of 1869 did extend the city ordinance over this place; but we say to you, that it had not this effect, and that act was unconstitutional and void, as we shall thereafter say more fully in answer to a point submitted by the defendant. You must therefore, in your investigation, consider the evidence as if no such ordinance existed. The ordinance referred to is withdrawn from your consideration.

"Greater danger demands higher vigilance, and when it is said that negligence is the absence of ordinary care, it must be understood that ordinary care depends very much upon the circumstances of each particular case. Certainly, what might be ordinary care in running a train in an uninhabited country, might be gross negligence in running the same train, in the same way and at the same speed, through the streets of a town or city. If you find that the defendant's train was running at the usual rate of speed, and not at a reckless and dangerous rate, but with

proper care and caution, upon a good track, with the best brake then known, and with a due regard — and by this I mean, with that regard that a prudent man would have — for the protection of human life under the circumstances of this case, then, we say to you, that the plaintiffs cannot recover, and your verdict should be for the defendants.

“But should you find that the defendant was guilty of negligence in the running of this train, you have another question to determine, — that of contributory negligence. Were the plaintiffs guilty or chargeable with contributory negligence in permitting their son, a boy of eight or nine years of age, — the evidence shows that he was about eight years and six months old when killed, — to go out in this neighborhood without a protector, or in sending him on an errand which required him to cross the railroad track of defendant, without having a care-taker with him? The evidence is that he was a healthy, intelligent boy. Was this such a dangerous place, that it was unsafe for a boy of this character to be absent from the reach of his parents or some care-taker? Are the parents chargeable with negligence in regard to their son, because the mother sent him upon this errand? You will observe that there is no evidence that she directed him to go up to his aunt's by the short cut upon the railroad track. It is very clear, he could have gone to his aunt's without going upon this track, except to cross it.

“*But further, was this boy guilty of negligence in walking up along the track of this road, or was he without that judgment and discretion by reason of his tender years, which would charge one of more mature years with negligence? This child is to be held responsible for that degree of negligence only which would be attributable to one of its years.*

“This question of contributory negligence, as indeed frequently questions of negligence are, is a mixed question of law and fact, and is to be decided by the court when the facts are undisputed or conclusively proved; but not to be withdrawn from the jury when the facts are disputed or the evidence conflicting. *The rule of law in regard to an adult differs from that of an infant, or one of more tender years. The degree of discretion in the case of an infant depends on his age and knowledge. Of a child of three years of age, less caution would be required than of one of seven, and a child of seven less than one of still an older age. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case. Did this boy exercise that ordinary care that is required of one of his age? Was he crossing the railroad track at the usual crossing and cart-road, or was he walking up along the track — on the track where a large number of trains were running daily, passing each other at times, going east and west? For we say to you, that if this boy was walking on the track of this road, taking it as a short cut to his aunt's, he was where he had no right to be; and it matters not that many others had done the same; this did not justify this boy, nor could it justify the father and mother in using this track as a foot-way; and if the boy in so doing had sufficient judgment and discretion to know the danger he was running, and did not exercise the ordinary care that one of his age and maturity should, he was guilty of such negligence, concurring to an accident, as would prevent him from recovering against the company, be-*

cause he was a wrong-doer — a trespasser — and did not guard against the injury as he might have done. And if he could not recover, under the same conditions, if the accident resulted in his death, the plaintiffs cannot recover ; for his negligence — the negligence of the son, the servant, the agent — is imputable to the plaintiffs themselves, when they ask to recover damages for an injury to their son, which was occasioned by an accident to which his own negligence contributed.

“ If the boy was old enough to go to school in the neighborhood, to be sent an errand requiring him to cross the railroad track, had he sufficient judgment and discretion to know the danger of walking upon this railroad track ? If he had, this judgment and discretion, did he exercise that ordinary care that the law exacts of him ? Did he know that he incurred the risk of trains passing over this track he was walking upon ? These questions are for you ; as you find the facts, the law determines the rights of the parties. If the boy had this judgment and discretion, and did not exercise it, he was guilty of such negligence and want of ordinary care in going upon and along defendant’s railroad track, as would prevent the plaintiffs from recovering in this action. . . .

“ Was the defendant guilty of negligence in running its train that caused the death of Edmund Lewis ? If it was not, your verdict should be for the defendant ; if it was, were the plaintiffs guilty of contributory negligence in permitting the boy to be out without a protector, or in sending him an errand which required him to cross the railroad track ? And here I may say to you that I recollect no evidence to justify you in finding plaintiffs guilty of contributory negligence, except in permitting him to be out without a protector, and in sending him to his aunt’s, which required him to cross the railroad track ; and this you will consider in connection with his age and maturity, and the dangerous locality, as we have already instructed you. Or, had the boy sufficient judgment and discretion to know the risk he was running, and did not use the ordinary care the law requires of one of his age and maturity, to avoid the danger he was exposed to under all the circumstances of this case ? If you find that there was negligence in the boy, under our instructions, then the plaintiffs cannot recover.”

The verdict was for the plaintiffs for \$1,000.

The defendant took a writ of error.

The sixth assignment of error was, that the court erred in submitting the case to the jury after answering defendant’s sixth point in the affirmative.

The ninth assignment of error was that “ the court erred in submitting the case of the plaintiffs, both in the general charge and answers to the points, as if the action was brought by the boy instead of by the plaintiffs.”

The other assignments were the answers to the defendant’s points and the parts of the charge in italics.

*L. W. Hall & F. Jordan*, for the plaintiff in error. The child was where he had no right to be ; the defendant had the right to presume that even children of tender age would not be on its track ; they could not be there without fault of their parents or guardians. *Railroad Co. v. Hummel*, 8 Wright, 375. Though a child of tender years may recover

for an injury, partly caused by his own imprudent act, a parent cannot. *Glassey v. Railroad Co.* 7 P. F. Smith, 173.

As to the 9th assignment of error, they cited *Railroad Co. v. Spearen*, 11 Wright, 300. Railroad companies must keep the time announced in their schedules. Wharton on Negligence, § 662; *Denton v. Gr. W. Railway*, 5 E. & B. 860; *Gordon v. M. & L. Railroad Co.* 52 N. H. 596. No conceivable rate of speed is *per se* evidence of neglect. Shearman & Redf. on Negligence, 535, sec. 478; *Wild v. Hudson River Railroad Co.* 29 New York, 315.

*O. F. Johnson & H. Alricks*, for defendant in error. Whether permitting the child to go along the railroad was negligence, was for the jury. *Catawissa Railroad Co. v. Armstrong*, 2 P. F. Smith, 282; *Shinhold v. N. Beach & M. Railroad*, 40 Calif. 447; *Drew v. Sixth Avenue Railroad Co.* 26 N. Y. 49; *Loveit v. Salem & S. Danvers Railroad*, 9 Allen, 563; *Pennsylvania Railroad v. Kelly*, 7 Casey, 372; *Philadelphia & Reading Railroad Co. v. Long*, 25 P. F. Smith, 257. Whether ordinary and reasonable care was used was for the jury. *Pennsylvania Railroad Co. v. Ackerman*, 24 P. F. Smith, 265. More care is to be exercised by engineers towards the young, the aged, and infirm, than towards those of mature years and active bodily powers. 38 N. Y. 445; *Baltimore & Ohio Railroad Co. v. Fryer*, 30 Maryland, 47; *O'Flaherty v. Union Railway Co.* 45 Missouri, 70. To constitute negligence of parents, there must be such omission as persons of ordinary prudence exercise towards their children. *Beers v. Housatonic Railroad Co.* 19 Conn. 566. Negligence and contributory negligence are for the jury, and to be determined by the circumstances of each case. *Robinson v. Cone*, 22 Vermont, 225; *Pendrill v. Second Avenue Railroad*, 43 Howard, 409; *Johnson v. Bruner*, 11 P. F. Smith, 58. The father being employed in the Lochiel Mills, and thus having the right to use the crossing there, the child had the same right. *Pittsburg, F. W. & C. Railroad Co. v. Bumstead*, 48 Ill. 221; *Reeves v. Del. & Lacka. Railroad Co.* 6 Casey, 461; *Wild v. Hudson River Railroad Co.* 33 Barbour, 504. If the train was going too fast, the parting of the brake chain was no excuse. *West Chester & Philadelphia Railroad Co. v. McElwee*, 17 P. F. Smith, 312; *Aaron v. Second Avenue Railroad Co.* 2 Daly, 127. Railroad companies running their trains through cities or populous places are held to a degree of care commensurate with the danger thus involved. *T., W. & W. Railroad Co. v. Harmon*, 47 Ill. 298; *Johnson v. Hudson River Railroad Co.* 6 Duer, 633; *Daley v. Norwich & Worcester Railroad Co.* 25 Conn. 595.

Chief Justice AGNEW delivered the opinion of the court, May 24, 1875.

This case was submitted to the jury correctly and fairly. In the first place, the judge withdrew from the jury all the evidence that the public were accustomed to use the track at or in the neighborhood of the place of the accident as a passage way by sufferance of the railroad company; saying also that the company "is just as much entitled to the free and uninterrupted enjoyment of its track at this particular place as at any other along the entire line of the road." He also informed the jury, "that if this boy was walking on the track of this road, taking it as a short cut to his aunt's, he was where he had no right to be; and it mat-

ters not that many others had done the same; this did not justify this boy, nor could it justify the father and mother, in using the track as a footway."

He then fairly left the great question of the cause to the jury in fitting terms; that is, whether the train was "running at a safe and prudent rate of speed;" or (said he) "was the rate at which the train was approaching and running dangerous and reckless?" Again, "If you find that defendant's train was running at the usual rate of speed and not at a reckless and dangerous rate, but with proper care and caution, upon a good track, with the best brake then known, and with a due regard — and by this I mean with that regard that a prudent man would have — for the protection of human life, under the circumstances of the case, then we say to you that the plaintiffs cannot recover, and your verdict should be for the defendants." Surely this was not exacting an unjust or illegal degree of care and caution of the company entering within the outer limits of the city of Harrisburg, where the accident happened. It took place at the Lochiel Iron Works, situated immediately alongside of the track, where numerous hands were constantly passing and repassing, and in the vicinity of the rows of houses occupied by the hands employed in these large works, and in a neighborhood where many persons were likely to be. According to the plaintiff's evidence, the rate of speed of the train, while approaching and entering within these limits, was from twenty to twenty-five miles an hour. The engineer himself testified to eighteen miles, and it was shown that before the coroner's jury he had testified that the speed was from twenty to twenty-five miles an hour. There was therefore evidence which justified the instructions, and this distinguishes the case at once from that of the *Railroad Company v. Hummel*, 8 Wright, 375, in which Justice Strong says the cars were moving slowly by their own gravity, yet so perfectly under the control of the engineer that they could be immediately stopped. The question presented in this case is, therefore, whether a railroad company may enter into the outskirts of a populous city at a high and dangerous rate of speed, even though it be upon its own track where the people have no right to be. He would be without much feeling for his kind, and wedded to technical rights to an unwarranted extent, who could affirm this proposition; and thus leave a people unprotected by law, and subject to whatever danger any motive of interest or otherwise might lead to in the use of a high and dangerous rate of speed. The *Railroad Company v. Hummel*, *supra*, asserts the rights of a railroad company upon its own track, as thoroughly as any case to be found in the books, and even there it is said, "ordinary care they must be held to." Is it common prudence or ordinary care to run into the outskirts of a city at a rate of speed so high and reckless that persons happening on the track are liable at any moment to be overtaken and crushed to death by the ponderous wheels of the swiftly-moving engine? Conceding that these people are trespassers, yet must we have no regard to the habits, character, condition, and circumstances of a people living in a city and immediately on the line of a railroad? Clearly to disregard them would be contrary to our sense of humanity, and to that common judgment of mankind expressed in the maxim, "*Sic utere tuo, ut alienum non lædas*," and that rule of right doing which requires men

to do unto others as they would have them to do unto themselves. But beyond this there is also that supervising authority of the state, which, by its police powers, is enabled to regulate even positive rights, when it is necessary for the safety, protection, and welfare of the people. Hence it has been held that the speed of trains through towns and cities may be regulated by municipal ordinances. But the absence of any such positive regulation does not leave the way open to a railroad company to run its trains into a populous town at a dangerous and reckless rate of speed. Are the circumstances of the case not to be heeded, and are the people, regardless of the probability of the loss of life, to be run down and crushed to death merely because they happen to be trespassers? Does no duty rest upon a railroad company, because it is running upon its own track, unfenced and unguarded? Surely we must not disregard the habits, character, and condition of a people, accustomed to run thoughtlessly and unheedingly into danger. We must take into account the feebleness of age and helpless infancy, the infirmity of mind and body of many living on a railroad track, their want of reflection and unthinking heedlessness, their want of apprehension of danger, and entire absence of injury they suppose they do to the hard, rough track of a railroad; the many motives they have to do an act which, though a trespass, is seemingly to them no cause of complaint. Surely the courts have not lost their power to declare what is ordinary prudence and care in the use of its track by a railroad company merely because the track is its own, and no one may rightfully trespass there. The circumstances which qualify this right must be taken into account and submitted to a jury under proper instructions. It is said this is to subject the company to the influence of prejudice, and that juries are always unfavorable. The causes of this prejudice it is not proper to discuss, but the common sense of mankind is not often very far wrong. Not to submit circumstances to a jury upon the evidence, and under the controlling power of a court, is simply to set aside the trial by jury. Whether the population is dense or sparse at the *locus in quo*, what is the likelihood of danger, and what the rate of speed compatible with the public safety under the circumstances, are facts which necessarily find their way into the jury box. When it is thus determined that the rate of speed is incompatible with public safety, under the circumstances of the place, the rights of the company, even upon its own track, are qualified by the great law of the public good. Life is too sacred to become the sport of chance, or the sacrifice of heedless will. "*Salus populi est suprema lex.*" "*Necessitas vincit legem et quod cogit, defendit.*"

We hold, therefore, there was no error in the instruction of the court in this respect. This being the case, there cannot be any serious objection to the charge upon the other questions in the cause as to contributory negligence either on the part of the boy or his parents. Referring to the unlawful act of the boy in being upon the track, the judge said: "And if the boy in so doing had sufficient judgment and discretion to know the danger he was running, and did not exercise the ordinary care that one of his age and maturity should, he was guilty of such negligence, concurring to an accident, as would prevent him from recovering against the company because he was a wrong-doer—a trespasser—and did not guard against the injury as he might have done. And if he could not recover,

under the same conditions, if the accident resulted in his death, the plaintiffs cannot recover; for his negligence—the negligence of the son, servant, the agent—is imputable to the plaintiffs themselves, when they ask to recover damages for an injury to their son, which was occasioned by an accident to which his own negligence contributed.” As to the negligence of the mother herself, the court affirmed the fourth point of the defendants, leaving the facts to the jury, and this fully covered the ground in connection with the answers to the third and fifth points of defendants.

Finding no error, the judgment is

*Affirmed.*

BAILOR AND BAILEE. — DUTY OF BAILOR. — DILIGENCE OF BAILOR. — BANK. — SPECIAL DEPOSIT, ETC.

### FIRST NATIONAL BANK OF CARLISLE v. GRAHAM.

1. Collateral facts incapable of affording reasonable presumption as to the principal matter in dispute, are inadmissible as evidence, as tending to draw the minds of the jury from the issue and to prejudice and mislead them.
2. Where a bailment is for the sole benefit of the bailor, the bailee is answerable only for gross neglect; when solely for the benefit of the bailee, he is responsible for slight neglect; when reciprocally beneficial to both, the bailee is responsible for ordinary neglect.
3. A bailee keeping the property of the bailor with the ordinary care with which he keeps his own, does not fulfil his duty if the contract requires strict diligence and extraordinary care.
4. Where the benefits are reciprocal, the bailee is liable for neglect of ordinary care, although he has been careless and reckless in the management of his own goods as well as those of the bailor.
5. That the bailee has dealt with his own goods and the bailor's in the same way is evidence in adjusting the standard of duty and deciding the question of performance, and as a test of the bailee's good faith. It would raise a presumption of adequate diligence.
6. The measure of the bailee's responsibility is to be determined in each case by a comparison with the conduct of classes of men, not of individuals.
7. The mere voluntary act of the cashier of a bank in receiving securities for safe keeping will not render the bank liable for their loss; but if the deposit be known to the directors and acquiesced in, the bank will be liable.

MAY 26, 1875. Before Agnew, C. J., Sharswood, Mercur, Gordon, Paxson and Woodward, JJ.

Error to the court of common pleas of Cumberland County of May term, 1875, No. 72.

This was an action of assumpsit, brought October 13th, 1873, by Fannie L. Graham against the First National Bank of Carlisle, to recover the value of four United States 5-20 bonds of \$1,000 each, which had been left by her with the bank for safe-keeping, and for which there was given to her a receipt as follows:—

“CARLISLE, Pa., October 22, 1868.

“Miss F. L. Graham has left in this bank, for safe-keeping, four thousand dollars in U. S. 5-20 bonds of 1867, to be returned on the return of this receipt.

“CHARLES H. HEPBURN, Cashier.”

When the plaintiff demanded the bonds, they were not delivered to her, the officers of the bank informing her that they had been stolen, August 5th, 1871, from the vault of the bank, with other valuables. The plaintiff, alleging that the bonds had been lost through the negligence of the defendant, brought this suit.

The case was tried January 16th, 1874, before Junkin, P. J.

The plaintiff testified that she deposited the bonds with the bank for safe-keeping; she had also similarly deposited bonds on an association in Monmouth, Illinois. About three or four weeks after the robbery, she learned from a brother residing in Monmouth that the association there had been notified that the bonds had been stolen; she went to the bank to inquire, and was informed by C. H. Hepburn, the cashier, that the Monmouth bonds had been recovered. She then asked about her United States bonds, and he told her they had been stolen, "but I should say nothing about them, and keep quiet—that it was their loss and not mine. Soon afterwards, not feeling satisfied, I went to the judge (S. Hepburn, Sr., who was the president); I think Charles said to keep quiet and in that way they might discover who took them; when I saw the judge he assured me that I should not lose a cent; that they could afford to lose it and I could not, and said that I should not say anything about it; I saw him a number of times after that, and he always assured me I should not lose it, but still gave me no security; they, Charles and the judge, told me to come on and draw my interest." She first knew of the loss in September, 1871. They continued to credit her account with the interest on the bonds, the same as before the loss; the last credit was July 12th, 1873.

Plaintiff gave evidence that on August 5th, 1871, S. Hepburn, Sr., S. Hepburn, Jr., J. G. Orr, C. H. Hepburn, and H. Hepburn, were directors. S. Hepburn, Sr., was president, C. H. Hepburn was cashier, and J. G. Orr was teller. The stockholders were the same as the directors; S. Hepburn, Sr., owned 460 shares of the stock, each of the others owned 10 shares.

It was admitted that United States government bonds were received by the bank for safe-keeping, with the knowledge of the president, cashier, and teller, and received without compensation; that the bank collected the coupons without compensation; that they were received by the cashier, and that the coupons were sometimes paid to the owner in cash, and sometimes deposited to his credit; that coupons were sent by the bank to Philadelphia for collection, and were collected in the name of the bank, and then the bank either paid the owner the cash or credited his account; that these collections were made at the request of the owners of the bonds. There was no meeting of the directors for discount purposes from 8th February, 1870, until 1st October, 1873, when the board met and resolved to close the bank.

John G. Orr, teller, testified for defendants: "The bonds lost were kept in the safe inside the vault on an upper shelf, in the safe inside the interior iron drawer, and money was kept in the department below the bonds, and these bonds were kept just as we kept the other money and valuables of the bank; the first I knew of the disappearance of the bonds was on the afternoon of 5th August, 1871; a short time before three o'clock



I went down to the court-house to the election, and after being there half an hour, some one came in and told me that I was wanted up at the First National Bank; I went up and found Charles Hepburn, the cashier, and Judge Hepburn, the president, there, and the cashier informed me that nearly all the money of the bank had been taken, and asked me if I knew anything about it; I said I did not, and then I went into the vault and found that nearly all the money that was in the safe was gone, except a few packages of \$1 and \$2 notes; . . . I asked the cashier if he had looked to see whether the bonds were there; he said not, and I then went into the vault and looked and found that the package of bonds and some other papers were gone; we then examined and found a large pocket-book was also gone; in this pocket-book were the bonds of the president, cashier, and teller, and some other papers; there was no money in that. . . . Judge Hepburn said it would be better not to say anything about it; it might cause a run on the bank." . . .

C. H. Hepburn, the cashier, testified that the bonds were left in the original envelope in which they came from Washington; they were tied up in a bundle with other securities left for safe-keeping by other persons; the bundle was in a safe above the place where they kept their money, all within an iron door within the safe; the safe was a Lilly burglar-proof safe with combination lock; the inside door had a combination lock. Witness then described the circumstances of the discovery of the loss somewhat more at large than Orr, but corresponding in the main with his statement. The amount of money taken was about \$3,500. The Monmouth bonds and some other papers were recovered. Letters were written to the assistant United States treasurer at New York, about the robbery, on August 9th, and about the same time to the treasury department at Washington. Witness informed the plaintiff of the loss eight or ten days after it occurred; told her to feel perfectly easy about it and keep it quiet, so that they might be able to trace the bonds; that he and the president had talked the matter over, and they would individually pay every cent of them; that they would pay her interest as theretofore; this was repeatedly said to her by him afterwards. Witness testified further as to the situation of their safe, &c., and generally as to circumstances tending to show the care exercised in custody of the bonds.

Defendants gave evidence that the papers which were restored had been found on the 5th of August, 1871, about twelve o'clock M., by a man quarrying stone near the railroad at Bridgeport, eighteen miles from Carlisle.

In rebuttal, the plaintiff gave evidence from other witnesses of the request of the officers of the bank to keep the robbery secret, and that at an informal meeting of the president, cashier, and teller, they being also directors of the bank, it was determined to keep the matter secret, as it might be injurious to the bank.

The plaintiff then offered to prove by Mrs. Trout, that she had a deposit of government bonds in this same bank for safe-keeping; that she drew the interest and premium on her bonds regularly until the bank closed; and that, although living just opposite the bank, she never knew or heard of the alleged disappearance. This to rebut the presumption that there never was any robbery, and to show that bonds remained in the bank till its close, to be followed by proof of a similar character.

This was objected to by the defendant, admitted by the court, and a bill of exceptions sealed.

The witness testified: "I had bonds in this bank, and received a receipt for them and drew interest up to July, 1873; I only heard of the loss after the suspension; Charles said I should not lose."

F. S. Dinkle testified, under the same exception, that he had bonds deposited with the defendant: "I received all my money but \$100; I did not hear of the loss of the bank until after the bank had closed."

The following are points of plaintiff with their answers:—

1. If the jury believe that the plaintiff deposited the bonds for the value of which this suit is brought with the defendant for safe-keeping, and took the receipt of the cashier in evidence, for the same, the defendant was bound to exercise ordinary care, skill, and diligence, to keep and return the same safely; such care as men of ordinary prudence exercise in the care of their own property; and if defendant did not use ordinary care to keep plaintiff's bonds safely, but kept the same negligently, then it is liable for their loss, and plaintiff is entitled to recover their value.

Answer. "First point affirmed, and for the meaning *gross* negligence, the jury is referred to the general charge."

3. If defendant was negligent, and did not exercise ordinary care, skill, and caution to keep plaintiff's bonds safely, then it is liable for their value, no matter how negligent it may have been in taking care of its own property.

Answer. "Affirmed; see general charge."

7. If the jury believe that the defendant endeavored studiously to conceal the loss of plaintiff's bonds; did not inform her of their loss, although living in the same town, for some weeks afterwards, and then enjoined silence upon her by stating she should lose nothing; that it would be defendant's loss, not plaintiff's; and made no attempt to discover the alleged thief, except by procuring its attorney to write to government officers in Washington and New York, and did not telegraph or write to any bankers or brokers in Pennsylvania; this is strong evidence of negligence on the part of the bank, and proper to be taken into consideration by the jury on the question of negligence.

Answer. "This point is affirmed. We have fully instructed you on this branch of the case in the general charge."

The following are points of the defendant, with their answers:—

2. The defendant being chartered under the acts of Congress, and its objects, powers, and duty being thereby defined, and no power being thereby given authorizing it to become a bailee or depositary of valuables in the manner alleged by plaintiff, the act of the cashier in so receiving such valuables would not make the bank liable to the plaintiff, and she cannot recover.

Answer. "We have already told you that the bank is liable only where these special deposits are received from time to time, with the knowledge of its directors. If they were so received in this case, the bank is liable, if gross negligence has been shown."

4. Even if the bank could legally become a bailee, as alleged by plaintiff, the proof being clear that no compensation was paid for keeping it, and that it was taken and kept at the request of the plaintiff for her

own convenience, the plaintiff cannot recover, unless she shows that the defendant was guilty of gross negligence; and the test of good faith and want of gross negligence is: "Did the bank keep the deposit with the same care and security as it did its own property?"

Answer. "Affirmed; except that the deposit must be kept with the same care that an ordinarily prudent man would keep his own of like kind and value."

7. If the plaintiff, after being informed of the loss of the bonds, acquiesced in the silence of the officers of the bank as to the loss, and concurred therein, she is guilty of concurrent negligence and cannot recover upon the ground that the bank did not give notice of the loss.

Answer. "We cannot answer as requested. Her agreeing to keep silence is not concurrent negligence in the sense of that term. The effect of inducing her to keep silence cannot affect the questions on which the case turns. It is a question of gross negligence of the part of the bank, and she could do nothing, by her agreement to maintain silence, which could affect the question of gross negligence."

The court charged:—

... "No compensation was to be received for the care of this deposit by the bank. It was therefore a naked bailment without reward, and without any special undertaking, which, in the civil and common law, is called what this really was, *depositum*; the bailee will be answerable only for *gross negligence*, which is considered equivalent to a breach of faith, as every one who receives the goods of another in deposit impliedly stipulates that he will take some degree of care of them. The degree of care which is necessary to avoid the imputation of bad faith is measured by the carefulness which the depositary uses towards his own property of a similar kind; so that the doctrine may be regarded as well settled, upon authority and reason, that where one makes a simple deposit in which there is an accommodation to the party making it, and the advantage is to him alone, he shall be the loser, unless the person to whom he intrusted the deposit has shown bad faith, in exposing the goods to hazards to which an ordinarily prudent man would not expose his own; and only when it is shown that the bailee has kept the goods or deposit in such a manner as no ordinarily prudent man would keep his own, is he guilty of *gross negligence*, and only when this is shown is he guilty of such neglect as renders him liable for the value.

"[*Gross negligence* is the omission of those precautions which persons of common care and common prudence would naturally adopt, even though they might, in reference to their own goods, omit them; so that the test of *gross negligence* is not simply: 'Did the bailee take as much care to preserve from loss the property bailed as he did of his own?' for he might be grossly careless of his own; 'but did he take that kind of care which persons of common care (customary care) do take of their own?']

"Good faith requires that the bailee should take *reasonable* care of the deposit, and what is reasonable care must materially depend upon the nature, value, and quality of the thing, and the circumstances under which it is deposited, and upon the character and confidence and particular dealings of the parties. He is bound to exercise a degree of care pro-

portioned to the nature and value of the article; the danger of loss, and the temptations to theft; and if he take the same care of the goods bailed as he did or does of his own, that will ordinarily repel the presumption of *gross* negligence. The desire to preserve one's own property from loss from any cause is, as a rule, so universal, that the mind rests with satisfaction upon that evidence which shows the same care of the bailed property that the bailee took to save his own, unless it is shown that he was grossly negligent of both, and when this is done he is not excused, but held answerable. With these simple rules for your guidance, we will do what we can to aid you in their application to this case." . . . .

The court then recapitulated the evidence in the case and proceeded:—

"[The evidence offered to repel the alleged theft is the fact that Dinkle and Mrs. Trout, who had bonds in this bank, went there and drew their interest as before. Dinkle had \$700 in bonds, and from time to time kept lifting them, by the bank paying him the cash for them—the same as if the bonds were still there; but he saw no bonds—he was paid money. The explanation offered for this apparent inconsistency is this: That after the loss was detected, the Messrs. Hepburn, on consultation, resolved to assume the loss, and keep it quiet, lest the bank would be run upon. Now does this account for what otherwise seems unaccountable, and explain why they continued to treat the bond-owners just as they had done before?] . . . . [Banks would be somewhat embarrassed if it were held for law that they must not open their vaults to transact their own business, for fear some bond depositor, who pays nothing for the care of his property, might lose his bond. He must incur that risk or remove his bond into his own possession, and this is altogether reasonable.]

"Should you find that there was a larceny of the plaintiff's bonds on that 5th day of August, 1871, and that thus the bonds were lost, with no gross negligence on the part of the officers of the bank having the care of its deposits, this plaintiff should not recover; *unless*, however, that it is found that the plaintiff was prejudiced by the neglect of the bank to give her immediate notice of the loss, as we will hereafter explain more fully.

"It is clear that the plaintiff's bonds were kept in the inner iron box within the safe, which itself was within the vault in the same place, and under the same securities that the money and valuables of the bank were kept. More than this could not be expected with reason; and more than this the plaintiff could not expect, as she paid nothing for the security, and the bank was not an insurer. [The bank was not bound, from the nature of the relation between it and the plaintiff, to resort to extraordinary measures to secure her bonds, but only to keep them with ordinary and customary care, as ordinary careful persons keep the like kind of property.] . . . .

"[Should no gross negligence be found by you on the part of the defendant in caring for the plaintiff's bonds, then you must look into the effect of the neglect on the part of the defendant to give this lady immediate notice of the loss.] The rule of law is, that where the bailee ac-

counts for a loss, in a way not to implicate himself in a charge of negligence, this is a sufficient defence; *unless* the plaintiff *proves* negligence.

"Now, what is the precise effect of the failure of the bailee to give the bailor notice of the loss? [My first impression was that it might be treated as absolute proof of negligence; but, on careful reflection, it seems to me that this would be carrying the inference too far, and that reason requires that it should be limited to raising a presumption of negligence, which presumption may be repelled; but even when thus repelled and rebutted, it still remains a question for the jury to determine whether any injury resulted to the plaintiff from the neglect of the defendant to give her notice of the loss. If you are satisfied that the bank from prudential motives, either from the honest belief that publicity would only diminish the chances of the recovery of the bonds, &c., or from the fear that there might be a panic among the depositors, or from both, and this resulted in no injury to this lady, by preventing her from adopting measures for their recovery, then we see nothing in the want of notice which would render the bank liable. If, however, there was a reasonable probability that her own efforts would have resulted to her advantage in the recovery of the bonds, and thus injury resulted to her, then the bank is liable and she should recover. Is it probable that she herself could have been more successful in her efforts in this direction than the bank? This is an important inquiry, and if it is reasonably certain to your minds that this lady would have recovered the property had the loss been immediately made known to her, the neglect of the bank to give the notice would make the defendant liable; if, on the other hand, no such benefit would have been likely to result to her from such notice, we do not see that the failure to give it should *per se* render the bank liable; and it would be injustice to hold the latter to responsibility for that which, if given, would have been fruitless to the plaintiff.]

"[And, furthermore, should you find that had the bank itself taken more efficient measures to advertise the loss, employing detectives, &c., and there was a reasonable probability that the loss would have been recovered, that should make them liable.]" . . . .

The verdict was for the plaintiff for \$4,790.

The defendant took a writ of error, and assigned for error:—

1. Admitting the evidence of Mrs. Trout and Dinkle.
- 2-4. The answers to the plaintiff's points.
- 5, 6. The answers to the defendant's 4th and 7th points.
- 7-13. The parts of the charge in brackets.

14. The charge as a whole tended to mislead the jury as to the law and its application to the facts in the case.

15. The answers to the defendant's 2d point.

*S. Hepburn, Jr., & W. F. Sadler*, for plaintiff in error. As to the first error, they cited *Smith v. First Nat. Bank of Westfield*, 99 Mass. 605. The definition of *gross* negligence as given by the court below is but the definition of *ordinary* negligence. *Jones on Bailment*, 21, 22, 47; *Tompkins v. Saltmarsh*, 14 S. & R. 279; *Phila. & R. Railroad Co. v. Spearen*, 11 Wright, 300; *Coggs v. Bernard*, 1 Ld. Raym. 909; *Foster v. Essex Bank*, 19 Mass. 479; *Pack v. Alexander*, 3 M. & C. 789;

*Lloyd v. W. Branch Bank*, 3 Harris, 176; *Scott v. Nat. Bank of Chester Valley*, 22 P. F. Smith, 471. Under the facts in this case the question of negligence was a question of law. *P., F. W. & Ch. Railroad Co. v. Evans*, 3 P. F. Smith, 250; *Howard Express Co. v. Wile*, 14 Ib. 206; *Glassy v. Hestonville Railroad*, 7 Ib. 172; *N. Penna. Railroad Co. v. Heileman*, 13 Wright, 60; *McCully v. Clarke*, 4 Ib. 406; *Penna. Can. Co. v. Bentley*, 16 P. F. Smith, 34; *Lance v. Griner*, 3 Ib. 206.

On the 15th assignment of error, they cited *Lloyd v. W. Branch Bank*, 3 Harris, 176; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Floyd Acceptances*, 7 Ib. 667; *U. S. Bank v. Bank of Columbus*, 21 Howard, 364; *Mechanics' Bank v. Bank of Columbia*, 5 Wheaton, 326; *United States v. Dunn*, 5 Peters, 51.

*J. Hays & J. H. Graham*, for defendant in error, as to the admission of Mrs. Trout's testimony, cited: *Pratt v. Richards*, 10 P. F. Smith, 58; *Bank v. Smith*, 8 Phila. R. 76; *Tompkins v. Saltmarsh*, 14 S. & R. 280. What is gross negligence is for the jury. *Dorman v. Jenkins*, 2 Ad. & E. 256; *Parsons on Cont.* 89, 690; *Addison on Cont.* 627; *Lancaster Co. Nat. Bank v. Smith*, 12 P. F. Smith, 54.

Mr. Justice WOODWARD delivered the opinion of the court, October 13, 1875.

On the 22d of October, 1868, Fannie L. Graham, the plaintiff below, deposited United States bonds, amounting to \$4,000, in the First National Bank of Carlisle, for safe-keeping. They were to be returned on the return of the receipt which was given to her by Chas. H. Hepburn, the cashier. Never having been returned, this suit was brought to recover their value. On the part of the defendants, evidence was introduced to show that the bonds, together with money and securities belonging to the bank, its officers, and other parties had been stolen from the vault on the 5th of August, 1871. Upon the trial the plaintiff was permitted to prove by Mrs. Trout that "she had a deposit of government bonds in the same bank for safe-keeping; that she drew the interest and premium on her bonds regularly until the bank closed; and that, though living just opposite the bank, she never knew or heard of the alleged disappearance." The object of the offer was stated to be "to rebut the presumption that there ever was any robbery, and to show that the bonds remained in the bank till its close." The testimony of Mrs. Trout was followed by that of F. S. Dinkle, to the same general effect. Its admission raises the first question the record presents.

Throughout the trial, the proof had been distinct and clear that the fact of the robbery had never been publicly disclosed. The officers feared that such a disclosure would injuriously affect the credit of the bank, and the president and cashier undertook, in their individual capacities, to become liable for the principal, interest, and premium of the bonds of depositors that had been lost. Notice was given to the assistant United States treasurer in New York, and to the treasury department at Washington. The plaintiff was informed of the loss through her brother, residing in Monmouth, Ill., some bonds issued by an association there being among her securities, and notice that they had been stolen having been given to that association by the officers of the bank. This, the plaintiff testified, was three or four weeks after the robbery. She called on the cashier,

who told her to say nothing and keep quiet; that it was their loss and not hers. She afterwards saw Judge Hepburn, the president, who made the same request that she should say nothing, and gave the same assurance that she should be paid. As to the other depositors, the proof was definite that, whether wisely or unwisely, all publication of the fact of the robbery was sedulously withheld. What, then, was to be gained by the admission of the testimony of these witnesses? It contradicted no facts alleged on behalf of the defence. It was consistent with the statement of the cashier, that he and Judge Hepburn had personally undertaken to pay the interest on the lost bonds. The facts were not only collateral, but they were superfluous for any legitimate purpose of the plaintiff's case. If the failure to make publication had been disputed, and there had been, in the judgment of the court, other affirmative and express evidence before the jury, on the question whether the whole theory of a robbery had been fabricated, it may be that the ruling would have been justified by the salutary principles which enlarge the field of inquiry where it becomes necessary to develop and expose an attempted fraud. There is nothing in this record to exclude the application of the rule that requires the rejection of all collateral facts which are incapable of affording any reasonable presumption or inference as to the principal matter in dispute. And the reason given in the text books for the existence of the rule seems peculiarly applicable here: "Such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead them; and, moreover, the adverse party having had no notice of such a course of evidence, is not prepared to rebut it." 1 Greenl. Evid. § 52. The case of *Pratt v. Richards*, 19 P. F. Smith, 58, is relied on to sustain the ruling of the court. There, Richards, the lessee of Cooley, had sublet part of the demised premises to Pratt & Co., the defendants. In May, 1861, the defendants failed, and asked Richards to cancel the lease. By the evidence offered and rejected in the court below, it was proposed to show that in June or July, 1861, Richards had surrendered his entire interest in the premises to the agent of Cooley, the owner, who placed a new tenant in possession of the room the defendants had occupied. The suit was by the assignees of Richards for rent for fifteen months subsequent to May, 1861. This court held the evidence to be admissible, and it is difficult to conceive of any principle on which any other conclusion could have been reached. But it is not apparent how that decision can have any bearing as an authority on the question presented here. Nor is the objection of the defendants met by the first suggestion, that the evidence of these witnesses was competent because it tended to establish the fact that notice by advertisement or otherwise was not given. The question of notice was not in controversy. It was both proved and admitted by the defendants as part of their own case, that public announcement of the robbery was purposely withheld. The evidence was improperly received.

The next question is presented by the series of assignments which allege error in the instructions given to the jury as to the measure and extent of the responsibility of the defendants. Assuming for present purposes on the faith of the verdict, that the act of the cashier was so far acquiesced in and ratified by the officers and directors, as to create a contract between

the plaintiff and the bank, it is manifest that the contract amounted at the utmost to a naked bailment. It was a deposit without compensation. No undertaking was expressed except that the bonds were to be returned on the return of the cashier's receipt. The law regulating such a contract has been settled since the decision of *Coggs v. Bernard*, 2 Ld. Raym. 909, in the year 1703. "Where a man takes goods into his custody to keep for the use of the bailor," it was said by Holt, C. J., in that case, "he is not answerable if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect." The principles which govern the relations between bailors and bailees are succinctly stated in Story on Bailments, sect. 23: "When the bailment is for the sole benefit of the bailor, the law requires only *slight* diligence on the part of the bailee, and of course makes him answerable only for *gross* neglect. When the bailment is for the sole benefit of the bailee, the law requires *great* diligence on the part of the bailee, and makes him responsible for *slight* neglect. When the bailment is reciprocally beneficial to both parties, the law requires *ordinary* diligence on the part of the bailee, and makes him responsible for *ordinary* neglect." In *Tompkins v. Saltmarsh*, 14 S. & R. 275, Duncan, J., in delivering the opinion of the court, said: "Where one undertakes to perform a gratuitous act, from which he is to receive no benefit, and the benefit is to accrue solely to the bailor, the bailee is liable only for gross negligence, *dolo proximis*, a practice equal to a fraud. It is that omission of care which even the most inattentive and thoughtless men take of their own concerns. There is this marked difference in cases where ordinary diligence is required, and where a party is accountable only for gross neglect. Ordinary neglect is the want of that diligence which the generality of mankind use in their own concerns, and that diligence is necessarily required where the contract is reciprocally beneficial. The bailee without reward is not bound to ordinary diligence, is not responsible for that care which every attentive and diligent person takes of his own goods, but only for that care which the most inattentive take."

These principles were applied by Coulter, J., in *Lloyd v. The West Branch Bank*, 3 Harris, 176, and by the present chief justice in *Scott v. The National Bank of Chester Valley*, 22 P. F. Smith, 471, and were recognized by Thompson, C. J., in *The Lancaster County Bank v. Smith*, 12 P. F. Smith, 54. In view of these well-established rules, the presentation to the jury of the legal aspects of this cause was inadequate and imperfect. There was no dispute that this was a gratuitous bailment, and in the general charge the court properly limited the responsibility of the defendant to a case of gross neglect. But this gross neglect was defined to be "the omission of those precautions which persons of common care and common prudence would naturally adopt, though they might, in reference to their own goods, omit them."

In the plaintiff's first point, the court were asked to charge that the defendants were "bound to exercise ordinary care, skill, and diligence to keep and return the bonds safely; such care as men of ordinary prudence exercise in the care of their own property." The answer was in these words: "First point affirmed, and for the meaning of gross negligence the jury are referred to the general charge." In the plaintiff's third



point, the court was asked to say, that "if the defendants were negligent, and did not exercise ordinary care, skill, and caution, to keep the plaintiff's bonds safely, then they are liable for their value, no matter how negligent they may have been in taking care of their own property." The answer was: "Affirmed: see general charge." The defendants had the right to complain of the manner in which the case was submitted to the jury. The standard of duty established for them was one to which they could not, under the evidence, be justly held. In the language of Judge Duncan, in *Tompkins v. Saltmarsh*, "they were responsible for the omission of care which even the most inattentive and thoughtless men take of their own concerns."

Upon the trial the ground was assumed by the defendants that there could be no recovery against them if the jury should find that they had taken the same care of the plaintiff's bonds that they had taken of their own securities, and complaint is now made of the failure of the court to sustain their position. In a multitude of cases, language has been used by judges which would seem to indicate the existence of the rule for which the defendants contend. Such language was employed in *Foster v. The Essex Bank*, 17 Mass. 479, and in the cases already referred to, of *Coggs v. Bernard*, *Lloyd v. The West Branch Bank*, and *Scott v. National Bank of Chester Valley*. In general, however, this view of the law has been abstractly stated; and where it has been applied, as in *Lloyd v. The West Branch Bank*, the diligence used by the bailee in the oversight equally of the deposit and his own property, corresponded with that diligence to which, in the circumstances of the particular bailment, the law held him bound, the authorities relied on by the defendants "do not seem," Judge Story has said, "to express the general rule in its true meaning. The depositary is bound to slight diligence only; and the measure of that diligence is that degree of diligence which persons of less than common prudence, or indeed of any prudence at all, take of their own concerns. The measure, abstractly considered, has no reference to the particular character of an individual, but it looks to the conduct and character of a whole class of persons." Story on Bailments, 564. The fact that the bailee keeps the property of the bailor with the ordinary care with which he keeps his own, does not fulfil the measure of his legal duty where the contract is one which requires strict diligence and extraordinary care. So, under a contract of bailment, in which the benefits are reciprocal, the bailee is not shielded from liability for neglect of ordinary care by proving that he has been careless, inattentive, and reckless in the management of his goods as well as those of the bailor. Cases for the application of the maxim of the Emperor Constantine, quoted in Jones on Bailments, 83, "*Aliena negotia exacto officio gerunter*," must constantly arise. The terms used in the authorities referred to are employed more by way of illustration than as a statement of the legal rule. That the bailee has dealt with his property and the bailor's in the same way, is a fact which may be always shown as an element in adjusting the standard of duty, and deciding the question of its performance, as well as a test of the bailee's good faith. On the proof of such a fact, a presumption of adequate diligence would ordinarily arise. But the question of the bailee's responsibility must be finally settled by a resort to the settled

principle which deduces the measure of his duty, in each particular bailment, from a comparison of his conduct with the conduct not of individuals but of classes of men. The instructions of the court on this subject in the general charge were, that if the bailee "takes the same care of the goods bailed that he does of his own, that ordinarily repels the presumption of gross negligence. The desire to preserve one's own property from loss from any cause is, as a rule, so universal, that the mind rests with satisfaction on the evidence which shows the same care of the bailed property which the bailee took to save his own, unless it was shown that he was grossly negligent of both, and when this is done he is not excused but held answerable." It is conceived that these instructions were unobjectionable. Whether the defendants were guilty of such gross negligence as to make them liable was a question which, like that which was raised as to the fact of robbery, and like the other issues involved, it was for the jury, under all the evidence, exclusively to decide.

Another error is alleged to have consisted in the answer by the court to the plaintiff's seventh point, relating to the failure of the bank to give notice of the robbery, and in the direction given to the jury on the same subject in the general charge. The discussion of the point undoubtedly was unduly amplified. The limitation of the plaintiff's right to a verdict only in the event that gross negligence should be made out, was neither expressed nor implied. The instruction, in substance, was, that she could recover if injury resulted to her from the failure of the defendants to give her notice, and that she could recover for such injury, if found, even though the presumption of negligence arising from the want of notice was repelled by proof. The effect of such a direction could only be to leave the precise question on which the jury were to pass in obscurity and doubt. The plaintiff in her testimony stated that she received intelligence of the loss through her brother in Monmouth three or four weeks after it occurred. Charles H. Hepburn thought the interval between the loss and the conversation he had with the plaintiff in regard to it was only eight or ten days. From the time she received notice, if upon a fair representation of their views and motives, she acquiesced in the policy of silence which the officers of the bank had adopted, it would be unjust to permit her to set up the subsequent maintenance of that policy as a ground for the imputation of gross negligence against the defendants. But the fact that no announcement was made in the interval, whatever it was, before the plaintiff was informed of the loss, was fairly a subject for the consideration of a jury. It was for them to weigh it in connection with the other evidence, in deciding the material issues in the cause. Its relevancy and value are shown by the significance that was attached to the proof of the conduct of a bailee contemporaneously with and immediately after a loss of property, in *Tompkins v. Saltmarsh*, *supra*. "I am of opinion likewise," Judge Duncan said, "that evidence ought to have been received of the hue and cry immediately after the discovery — his assiduous and indefatigable pursuit, and strict search, both at the inn and the steamboat. If he had made no complaint or inquiry, remained with his arms folded and his mouth shut, this would have afforded strong evidence of his delinquency; and though it has been said this would have been the course of a guilty man, yet it is

one which an innocent man would naturally take, and which, if he did not take, all would condemn him. Nothing would more strongly prove his neglect than this silence, this indifference; the jury would have drawn the most unfavorable conclusions from it." Every case must stand, of course, on its special facts. It may well be that the reasons for the action of the officers of the bank would be satisfactory to a jury, but the necessity is inevitable of submitting the question to them, whether that action involved gross neglect.

The remaining question arises out of the answer of the court to the second point of the defendants. The mere voluntary act of the cashier in receiving the plaintiff's securities would not subject the bank to liability. But if the deposit was known to the directors, and they acquiesced in its retention, a contract relation was created, by which the defendants should be held bound. The question arose in *Foster v. The Essex Bank*, 17 Mass. 479. That was an action to recover the value of a special deposit. The bank had no express power by charter to receive deposits of any kind, but the verdict found that the practice had been to receive them always; and Parker, C. J. said: "As the bank from the time of its incorporation has received money and other valuable things in this way, and as the practice was known to the directors, and we think must be presumed to have been known to the company, as far as a corporation can be affected with knowledge; and as the buildings and vaults of the company were allowed to be used for this purpose, and their officers employed in receiving into custody the things deposited, the corporation must be considered the depository, and not the cashier or other officer through whose agency commodities may have been received into the bank. The rule thus stated has been uniformly applied by this court in cases involving the rights and duties of the national banks. The principle announced in the recent New York and Vermont cases of *The First National Bank of Lyons v. The Ocean National Bank*, and *Wiley v. The First National Bank of Brattleboro'*, has never been adopted here, so far as it is in conflict with the rule. If the question here had grown out of an act prohibited by law, the principle of these recent authorities would be applicable, as it was applied in *Fowler v. Scully*, 22 P. F. Smith, 456. But the question arises out of an act which has been neither directly nor impliedly forbidden by statute. The answer of the court was accurate, and the complaint alleged against it in the supplemental assignment of error is unfounded.

Judgment reversed, and a *venire facias de novo* awarded.

## COURT OF APPEALS OF MARYLAND.

(To appear in 43 Md.)

**EQUITABLE SET-OFF. — AN ATTORNEY HAS NO LIEN ON A JUDGMENT RECOVERED FOR CLIENT, FOR PROFESSIONAL SERVICES. — INSOLVENCY AN EQUITABLE GROUND OF SET-OFF.**

**MARSHALL v. COOPER. SAME v. SAME.**

A judgment for \$6,000 was recovered in an action of *tort* by U. against C. in the superior court of Baltimore city in 1871, and was affirmed by the court of appeals in 1873. Prior to the institution of that suit, namely in 1866, U. became indebted to C. in the sum of \$11,000, for which, with interest thereon, C. held the promissory notes of U. secured by a deed of trust to R. conveying certain lands in Virginia. In 1868 C. instituted proceedings in equity in Virginia to enforce his claim against the property conveyed by the deed of trust. This claim was resisted by U. upon the alleged ground of fraud and usury, and by other defendants in the cause, who claimed to hold liens upon one of the parcels of land described in the deed of trust, prior and superior to the lien of C.; but the court in 1871 passed a decree in favor of C., not only against U. but also against the other defendants in the suit, and adjudged that C. was entitled to a priority of lien as against the property. From that decree the parties defendants took an appeal to the court of appeals of Virginia. U. being indebted to his attorneys, M. and F., for professional services rendered by them in the aforementioned action of *tort*, he having contracted, at the time of retaining them to prosecute the suit, to pay them one third of the amount which might be recovered, assigned the judgment therein recovered to them, to the extent of \$2,000, being the one third thereof. U. being indebted to other persons, the said judgment was entered to their use to the extent of their respective claims; these latter uses being entered subject to the previous entry to the use of M. and F. Upon failure by C. to pay to M. and F., upon their demand, the sum of \$2,000 with the costs adjudged by the court of appeals of Maryland, they caused a *fiery facias* to be issued out of said court in the name of U. against C., who thereupon filed his bill to restrain by injunction the enforcement of the judgment against him, until the determination of the proceedings pending in the court in Virginia, and until the mutual claims and demands of the complainant and U. should be adjusted by proper accounts to be taken between them under the direction of the court. The relief sought by the complainant was asked on the ground of an equitable set-off, the bill charging that he was precluded by the ordinary rules of law from setting up his claim against U. in the action of *tort*, in which the judgment was recovered. U., the judgment creditor, was utterly insolvent. *Held*: 1st. That the complainant was entitled to the equitable right of set-off, not only as against U. but also as against the parties to whose use the judgment was entered; and consequently entitled to be protected by injunction against the enforcement of the judgment. 2d. That, as against the equitable right of set-off, claimed by the complainant, M. and F. were not entitled to any lien upon the judgment, growing out of their contract with U., or for professional services rendered by them as attorneys in the suit.

The insolvency of a party seeking to enforce his judgment furnishes a sufficient ground for the interposition of a court of equity to enable the debtor to avail himself of a set-off.

**APPEALS** from the circuit court of Baltimore city.

The first appeal in this case was taken from the order of the court below, continuing the injunction previously granted, until the further order of the court; and the second was taken from the order of the said court dismissing the cross-bill of the defendants, Charles Marshall and William A. Fisher, it having been agreed that their answer to the complainant's

bill should have the effect of, and be taken as, a cross-bill. The case is stated in the opinion of this court.

The cause was argued before Bartol, C. J., Brent, Grason, and Miller, JJ.

*John Scott, Jr.*, for the appellants. It is settled that there can be no set-off if the *debt be subject to any contingency*, and the debt claimed to be due to the complainant is certainly of that character. See *Chance v. Isaacs*, 5 Paige N. Y. 595; *Myers v. Davis*, 22 N. Y. 489; *Bradley v. Angel*, 3 Comstock N. Y. 477, 478; *Mohawk Bank v. Burrows*, 6 Johns. Ch. 322; *Keep v. Lord*, 2 Duer (N. Y.), 81, &c.; *Ex parte Hale*, 3 Vesey, 304; *Dade v. Irwin*, 2 Howard, 388, 390.

The complainant is not able to make out his right of equitable set-off. The doctrine of equitable set-off is outside of, and independent of the statute. Some of the precedents from our sister states may justify its extension to the unpaid *balance* of the complainant's claim under the circumstances of this case, but the clear weight of authority is the other way; and by Judge Ormond, of Alabama, the mistake was said to have come from their inadvertently copying decisions made under the English statutes of bankruptcy.

The right of set-off ordinarily is not a common law right, due *ex debito justitiæ*, but a statutory innovation. The language of the statute is the limit of the right, and where a particular claim is not embraced in its provisions, the court has no power to extend the application. This case, it must be granted, does not fall within the purview of our act, and the complainant has to resort to the ancient equitable rule on the subject. That rule, which is solely of equitable origin, was of course framed on some requirement of equity, in order to enforce a right, or to prevent a failure of justice. The principle which underlies the cases is, that when two persons are mutually indebted, and he who claims the set-off trusted, as a means of paying himself, to the debt which he owed, in such a case he has a claim to that particular fund in preference to his debtor, and perhaps to all the world. There must be what the books call not only *mutual debts* but also *mutual credits*, which is very different from the *mutual credit* of the bankrupt act, which was the first English statute of set-off.

The ground of jurisdiction is the contract, express or implied, which gave the party an equitable property in the debt which he owed. He bargained for this before he would allow his creditor to run in his debt, and permitted the obligation to be incurred only on its faith and credit. He was necessarily in a very different position from one who had trusted solely to the personal credit of the debtor, and this difference of position gave him a right superior to any other, in the event that this fund was the only means of saving himself from loss. The insolvency of the party against whom the debt is to be set-off was a necessary condition; for otherwise the legal remedy was ample, without a resort to the security he had bargained for, but it is error to assert that insolvency *alone* is sufficient. It is just as necessary that the debt, which is claimed to be subject to the set-off, was contracted because the creditor himself owed one to which he understood he could resort. See *Timms v. Shannon*, 19 Md. 310, 317; *Rawson v. Samuel*, 1 Craig & Phil. 172, 175; *Ex parte Prescott*, 1 Atkins, 231; *Gordon v. Lewis*, 2 Sumner, 633, 634; *Howe v.*

*Sheppard*, 2 Sumner, 414; *Greene v. Darling*, 5 Mason, 207, &c.; *Riddick v. Moore*, 65 N. C. 387; *Tuscumbia, &c. R. R. Co. v. Rhodes*, 8 Alabama, 229; *Freeman v. Lomas*, 5 Eng. Law & Eq. 120; *Dade v. Irwin*, 2 Howard, 383, 390; 2 Story's Eq. Jur. section 1436, and notes.

The refusal to allow to Marshall and Fisher their costs, already incurred by them in the court of appeals, was an error. They were the equitable assignees of the judgment to the extent of one third of its amount, and when the case was taken up by appeal, the entry to their use made them responsible for all the costs, amounting in this instance to a large sum. Those costs they have incurred, and are now responsible for; and as a consequence of their success they obtained, upon the affirmance of the decision of the superior court, a judgment against the complainant to indemnify them for the outlay. They have also an attorney's fee for ten dollars taxed in this court, and it would be outrageous to make them lose, as this injunction does, not only their taxed fee, but also the costs, for which they have to answer to the clerk, out of their own pocket. The set-off certainly does not prevail against the costs adjudged against the complainant for wrongfully prosecuting his appeal, and which the appellee recovers solely as an indemnity for the outlay it has entailed on him.

Whatever may have been the old law on the subject of attorneys' fees, they are now the subject of contract and action, not only in Maryland, but throughout the United States. If they are the subject of contract, they may be secured like any other debt, and the security enforced by the ordinary process of the court. Marshall and Fisher, before performing any service, contracted for the amount of their fee, and also for its security, expressly stipulating that they were to have one third of what was recovered in the action. On the faith of that agreement, and relying entirely on its efficacy, they expended much time and labor; and certainly they ought not to be deprived of the fruit of their labor. It must be admitted that Marshall and Fisher could contract for a lien, and that Utterback could enter into a binding contract for such lien.

But this view of the case proceeds on the assumption that there is no *attorney's lien*, as such, and is founded entirely on principles of equity, which are common to all contracts. The weight of authority, however, is clearly in favor of the validity of the lien, and this conclusion is supported by the overwhelming preponderance of reason. In the case from Illinois, so confidently cited by the other side, the judge says that the conflict of precedent is such as to make the matter *res nova*, and he then proceeds to give his reasons in opposition to the doctrine. According to his statement, the lien is denied in Vermont, New Hampshire, Pennsylvania, Indiana, and Missouri; while in New York, Alabama, Georgia, and Florida it is favored and sustained. To these last may be added the court of appeals of Arkansas, the high court of chancery in England, and the supreme court of the United States.

The supreme court state it to be the prevailing rule of this country. Lord Eldon expressed surprise at a contrary doctrine, and said the lien was supported by principles of natural justice. The arguments in its favor, moreover, have been so strong as to reform the practice of the English court of common pleas, and to beat down all discordant precedents in New York, in which state, as in England, the lien now prevails in its fullest vigor.

Some misapprehensions may arise as to those cases in which the courts say that the claim of set-off is preferable to the lien of the attorney. On examination they will be found to rest on the principle, that *statute law must be obeyed*, whether it works injustice or not; and that the court has no option but to enforce the rule it prescribes. In some of the states, as New York and Texas, the statute allowed one judgment to be set-off against the other; and when the solicitor's lien was claimed, the statute was ruled to be paramount. In others, it was held that the legal right of set-off would be enforced in equity, because the case was one of legal nature, and a uniformity of practice was desirable. This case comes under none of those heads, since the set-off is not provided for by our statute, and the complainant's right is of purely equitable cognizance. *In re Paschal*, 10 Wallace, 493, &c.; *Rooney v. Second Avenue R. R.* 18 N. Y. 368; *Ward v. Syme*, 9 How. Pr. Rep. 25; *Hall v. Ody*, 2 Bos. & Pul. 28; *Read v. Dupper*, 6 Term R. 362; *Mitchell v. Oldfield*, 4 Ib. 123; *Gridley v. Garrison*, 4 Paige N. Y. 653; *Dunkin v. Vandenberg*, 1 Paige, 625, &c.; *Sexton v. Pike*, 18 Arkansas, 194, &c.; *Ex parte Plitt*, 2 Wallace, Jr. C. C. 479, &c.; *In re Fiddey, a solicitor*, 7 Chan. Appeal Cases, 776, &c.; *The Jeff. Davis*, 2 Adm. & Eccl. 2; *The Heinrich*, 3 Adm. & Eccl. 510.

*L. L. Conrad & S. Teackle Wallis*, for the appellee. Has equity jurisdiction to enforce Cooper's set-off, as against Utterback? Of this we think there can be no doubt. Its jurisdiction in this respect is independent of statute, resting on immemorial exercise of power. It is applied whenever a case of natural equity arises, not within the scope of statute law. Established grounds for its exercise are mutual and connected debts between parties, and insolvency of the party against whom the set-off is claimed. Either of these grounds is sufficient. Both exist here. The hopeless insolvency of Utterback is expressly charged, and is admitted. Nowhere is the general jurisdiction of equity in this regard more fully asserted than in Maryland. The Maryland statute gives a legal right of set-off in cross-demands, such as subsist between the parties here. Where such legal right exists, but the demand due the party claiming the set-off is so situated (and the insolvency of the other party is held to be such a situation) that he cannot obtain relief at law, equity will compel a set-off. *Waterman on Set-off*, secs. 14, 344-5, 395-6-7; *Kerr on Injunctions*, 68; *Bispham's Pr. of Eq.* 35; *Md. Code*, art. 75, sec. 12; *Merrill v. Souther*, 6 Dana, 305; *Jacoby v. Guier*, 6 Sergt. & Rawle, 448; *Gay v. Gay*, 10 Paige, 376; *Lindsay v. Jackson*, 2 Paige, 581-2; *Brazleton v. Brooks*, 2 Head (Tenn.), 194; *Colyer's Adm'r v. Craig*, 11 B. Monroe, 73; *Smith v. Donnell*, 9 Gill, 89; *Scott v. Scott*, 17 Md. 91.

Cooper's right of set-off against Utterback being unquestionable, the next inquiry is, whether the other defendants have any prior equities which supersede the operation of such set-off as to them. The strongest opposing claim is that of Marshall and Fisher. They claim \$2,000 as counsel fees, earned in the suit which resulted in the verdict against Cooper, of \$6,000 damages. They assert that this fee was secured to them by a contract, under which they were to receive one third of whatever amount should be recovered against Cooper; and to receive also a lien therefor on the judgment; that pursuant to said contract they entered the judgment to their use on the 14th November, 1871 — the day the verdict

was rendered. They claim, therefore, in a double right, viz., in virtue of their contract and of their attorneys' lien. In regard to the first, it is sufficient to say that no such contract was proven or admitted, and even if proved or admitted, Cooper was neither party nor privy to it, and is unaffected by it.

As to the second — their attorneys' lien. Originally, in England, in some courts, a solicitor had no lien of any sort on a judgment, even as against his client. In other courts his lien was admitted and protected to the extent of the *costs* allowed by law, which were considered to belong to the solicitor. At a later period, to avoid conflict, and to establish a uniform practice, the twelve judges adopted a rule recognizing the solicitor's lien in all courts to the extent of *costs*, but no further. No English case can be found which goes beyond this, even between solicitor and client.

In this country decisions have varied. A great preponderance of authority, however, coincides with the English rule.

In Vermont, New Hampshire, Illinois, Indiana, Pennsylvania, Missouri, Minnesota, California, and Texas, by the adjudications of their highest courts, the attorney's lien on judgments is limited to disbursements, and to *costs*, and such *fees* as are *taxed by law*. As to costs and fees, not so taxable, but the right to which lies in express contract, or in implied contract, as on *quantum meruit*, no lien attaches, and the attorney must pursue his rights by appropriate action, like any other claimant on contract. In Maryland the only case which touches the question approves this doctrine. *Strike's Case*, 1 Bland, 98.

The courts of New York appear to have enlarged the lien to an unprecedented, and we can but think, a dangerous extent. They admit it even for contingent fees. This would seem to be straining this, so to speak, prerogative right of attorneys to its utmost. But not even in those courts, far less elsewhere, can any case be found wherein the attorney's lien for fees is enforced against a legal or equitable right of set-off in the defendant. The appellants have not produced such a case. It is certainly incumbent on them to do so, for that is the precise issue they are required to sustain. We have cited many cases expressly holding the contrary. *Strike's Case*, 1 Bland, 98; *Forsythe v. Beveridge*, 52 Ill. 268; *Wells v. Hatch*, 43 N. H. 247; *Hill v. Brinkley* 10 Ind. 102; *Frissell v. Haile*, 18 Mo. 18; *Wright v. Treadwell*, 14 Texas, 255; *Ex parte Kyle*, 1 Cal. 331; *Jacoby v. Guier*, 6 Sergt. & Rawle, 451; *Hayden v. McDermott*, 9 Abbott's Pr. R. 14; *Martin v. Kanouse et al.* 17 Howard Pr. R. 146; *Nicoll v. Nicoll*, 16 Wend. 446; *Dubois's Appeal*, 38 Penn. St. 235.

Assuming the lien claimed by Marshall and Fisher to have ever existed, they have long ago lost it. By the entry to their use, November 14, 1871, they became assignees *pro tanto*, and extinguished their lien.

An entry to the use of, is an assignment. An assignee is an owner. Lien is an adverse right, and cannot coexist with ownership. The two are inconsistent. The union of title and charge destroys the charge. This general rule is applicable to all cases where the minor right is merged in ownership. When Marshall and Fisher became assignees they ceased *ipso facto* to be lienors. 3 Parsons on Contracts, 245-6-8; *Dodd v. Brott*, 1 Minn. 270; *Glenn v. Spry*, 5 Md. 110; *Mitchell v. Mitchell*, 2 Gill, 231.



Their position was not merely that of assignees; they were assignees with notice, and accordingly were subject to all the equities to which their assignor was liable. *Kerr on Injunctions*, 68; *Waterman on Set-off*, secs. 83, 96; *Dodd v. Brott*, 1 Minn. 270; *Central Bank v. Copeland*, 18 Md. 317; *Timms & Wife v. Shannon*, 19 Md. 314; *Gay v. Gay*, 10 Paige, 377; *Merrill v. Souther*, 6 Dana, 305.

The claims of Brooke and Scott and Sanders, as against Cooper, need hardly be treated seriously. They were ordinary creditors of Utterback. Their sole right in the Utterback judgment is derived from the assignments thereof, which they took in February, 1873. The evidence shows them to have been familiar with the litigation between Cooper and Utterback in Virginia. Indeed Sanders was a party to it, and Brooke and Scott were Utterback's counsel, and their claim is for services rendered in that very litigation. They were assignees under assignments taken long after Cooper's claims were known to them. The authorities already cited, as to assignees with notice, effectually dispose of their pretensions.

BARTOL, C. J., delivered the opinion of the court.

The object of the bill of complaint in this case, filed by the appellee, is to restrain by injunction the enforcement of a judgment at law against him, until the determination of certain proceedings pending in the court of appeals of Virginia, and until the mutual claims and demands of the complainant and the judgment creditor shall be adjusted by proper accounts to be taken between them, under the direction of the court. The appellee asks relief on the ground of an equitable set-off.

The judgment for \$6,000 was recovered in an action of *tort*, by Charles H. Utterback against the appellee, in the superior court of Baltimore city, in November, 1871, and was affirmed by the court of appeals in January, 1873. 37 Md. 282. Long before the institution of that suit, viz., in July, 1866, Utterback became indebted to the appellee in the sum of \$11,000, for which, with interest thereon, the appellee held the promissory notes of Utterback, secured by a deed of trust from the debtor, to R. W. L. Rasin conveying certain lands in Fauquier County, Virginia. In February, 1868, the appellee instituted proceedings in the circuit court of Fauquier County, Virginia, sitting as a court of equity, for the purpose of enforcing his claim against the property conveyed by the deed of trust. In that case the claim of the appellee was resisted by Utterback, upon the alleged ground that it was fraudulent and usurious, and by other defendants in that cause, who claimed to hold liens upon one of the parcels of land described in the deed of trust, prior and superior to the lien of the appellee. It appears from the proceedings in that case, which are exhibited with the bill, and by agreement are made evidence, that issues were framed and sent by the court to a jury, to try the questions of the alleged fraud and usury on the part of the appellee; and the jury, by their verdict, found upon the issues in favor of the claim of the appellee as legal and valid; and it further appears that the court in September, 1871, passed a decree in favor of the appellee, not only against Utterback, but also against the other defendants in that suit, and adjudged that the appellee was entitled to a priority of lien as against the property. From that decree, the parties defendants in the suit have

taken an appeal to the court of appeals of Virginia, which appeal is still pending and undecided.

The bill in this case charges that "even if the decree of the circuit court of Fauquier County shall be affirmed, the amount which your orator will be able, at the best, to realize thereunder from the premises there in controversy, will fall far short of your orator's said debt and interest, and the said Utterback will remain indebted to your orator in a large sum of money, if not to the full amount of the judgment which he has recovered against your orator in this state. If the said decree should be reversed, the said Utterback will be indebted to your orator in the full amount of your orator's debt of \$11,000, and interest," &c. &c.

The bill further charges, that "Utterback is wholly and hopelessly insolvent, having been so at the time he became indebted to your orator aforesaid, and continues so down to the present moment."

And the bill further alleges, as ground for equitable relief, "That having been precluded by the ordinary rules of law from setting up his claim as aforesaid against said Utterback in the action of *tort*, in which said judgment was recovered against him, he has no means of defending himself against the gross and manifest injustice, which would result to him from the execution of said writ of *fiery facias*, except by seeking the interposition of this honorable court, and he humbly submits that in view of the circumstances aforesaid, and the insolvency of said Utterback, he is entitled to be protected by injunction, forbidding and restraining the same, until the final determination of the appeal now pending as aforesaid in the court of appeals of Virginia, and your orator tenders himself ready and willing when said appeal shall be determined, or the amount of said Utterback's liability to him finally ascertained, to pay over, as your honor may determine, any part of the judgment aforesaid, which may remain due by him, after first deducting what may be otherwise left unsatisfied of his claim against said Utterback."

It appears by the record, and the agreement of facts signed by the solicitors, that Utterback was indebted to his attorneys, Marshall and Fisher (the appellants), for professional services rendered by them in the suit against the appellee, to the amount of *one third* of the judgment therein recovered, as of the date of the entry to their use (*viz.*, in November, 1871), he having contracted at the time of retaining them to prosecute the suits, to pay them *one third* of the amount which might be recovered in the same. That he was also indebted to the appellants, Brooke and Scott and Sanders, the amounts respectively mentioned in the assignments to their use respectively. That they had issued attachments upon their respective claims, in order to reach the proceeds of the judgment, in the hands of the appellee, who was made garnishee in December, 1871, and pleaded *non assumpsit* and *nulla bona* thereto; that these attachments were pending until February, 1873, when they were dismissed upon the agreement of Utterback to assign to them the judgment, in the manner shown by the copy of the judgment exhibited with the bill; that the amounts due to them remain wholly due and unpaid, and the assignment to them was intended to enable them to secure satisfaction thereof out of the proceeds of the judgment.

It further appears that the appellee received from the proceeds of the

sale of one of the parcels of land mentioned in the deed of trust, \$2,100.34, May, 1868, and applied the same on account of Utterback's debt to him — which sum is not involved in the appeal. That the appellee also received from the rental of the farm now in controversy the aggregate sum of \$1,763.77 — paid to him by the receiver, under the orders of the circuit court of Fauquier County. And that the last mentioned farm was sold, under order of the same court, and was bought by the appellee, and that the proceeds of sale, after deducting costs and expenses, amounted to \$7,335.65, which was allowed to and received by the appellee on account of his claim, — and that he has since resold the farm.

The questions to be decided are, first, whether the appellee is entitled to the equitable right of set-off claimed by him, and to what extent? and secondly, whether such right can be maintained, as against the parties appellants, to whose use the judgment has been entered?

In deciding the first question, it is material to ascertain to what extent the appellee's claim has been paid and satisfied; and this depends upon the effect of the proceedings in Virginia.

The appellants contend that all the money received by him, including the net proceeds of the farm purchased by him, and amounting in the aggregate to \$11,199.76, is to be applied in the reduction of his claim as payment thereon; and that the balance only can be claimed as a set-off, which the appellants state to be only about \$2,700; and they contend that it is inequitable, even if the right of equitable set-off exists, to make the injunction embrace the whole judgment, and restrain the appellants from collecting any part of it.

We do not concur in this view; with the exception of the sum of \$2,100.34 before mentioned, which it is conceded was received absolutely, and applied in the reduction of the debt, we do not think the moneys which came into the appellee's hands under the court's orders, from the rental and sale of the land in dispute, can be considered as absolute or final payments upon his claim.

The orders and decree under which they were received are not final, but still open and subject to be reversed on appeal; and the money is held by the appellee, not in his absolute right, but as a mere stakeholder, subject to the final decision of the cause, to be applied in the satisfaction of his debt, only in the event of an affirmance of the decree of the circuit court, and in case the same is reversed, will belong to others, and his debt will remain unsatisfied, except to the extent of the credit first mentioned. Under these circumstances, it cannot be said that the appellee has not a subsisting claim, which a court of equity will recognize, to an amount exceeding the amount of the judgment. There is no question as to the insolvency of Utterback, the judgment creditor. This fully appears from the record, and as against him, there can be no doubt of the equitable right of set-off claimed by the appellee. Besides the other equitable grounds stated in the bill, arising from the nature of the appellee's cross-claim, and his inability to assert the same as a set-off at law, in the action of *tort* against him, — the insolvency of Utterback furnishes equitable ground for the interference of the court.

In *Waterman on Set-off*, sec. 396, the author says, "It is deducible from the general scope of the authorities, that insolvency has long been

recognized as a distinct equitable ground of set-off," and cites many authorities. This was distinctly decided in *Lindsay v. Jackson*, 2 Paige, 581 — a case which has been cited and approved by this court in 9 Gill, 89, and 17 Md. 91. We refer also in support of this proposition to *Gay v. Gay*, 10 Paige, 376; *Merrill v. Souther*, 6 Dana, 305; *Pond v. Smith*, 4 Conn. 297; *Robbins v. Holley*, 19 B. Monroe, 91; and *Tuscumbia R. R. Co. v. Rhodes*, 8 Alabama, 206. In this last case the doctrine governing courts of equity on this subject is fully and ably discussed in the opinion of Judge Goldthwaite. From these authorities, and others might be cited to the same effect, it is clear that the appellee, as against Utterback, would be entitled to be protected by injunction against the enforcement of the judgment.

The authorities cited by the appellants, to show that the equitable right of set-off does not exist where the cross-claim is a mere contingent one, depending for its existence upon some contingency to happen in the future, have no application to this case; because, as we have before stated, the claim of the appellee is not one of this character, but a present subsisting debt to the extent we have before indicated.

It remains for us to consider whether the appellee is entitled to relief as against the appellants, the assignees of the judgment.

As respects Brooke and Scott and Sanders, who claim simply as assignees, it is quite clear that they stand in no better position than the judgment creditor, and are subject to the same equitable rights which existed against Utterback. This is abundantly shown by the cases of *Gay v. Gay* and *Merrill v. Souther*, before cited, and by *Central Bank v. Copeland*, 18 Md. 305; and *Timms v. Shannon*, 19 Md. 277. We refer also to *Jacoby v. Guier*, 6 Sergt. & Rawle, 45; Kerr on Injunctions, 68; and to Waterman on Set-off, secs. 83, 96, and cases there cited.

This principle applies also to the appellants, Marshall and Fisher, so far as they claim as mere assignees. They assert, however, a right to a superior equity, on the ground of a lien to which they claim to be entitled as attorneys for Utterback, in the suit in which the judgment was recovered.

By reference to the English cases, it appears that formerly the rule on this subject was not uniform; in some of the courts the solicitor had no lien whatsoever, while in others his lien existed to the extent of the costs allowed by law, which belonged to the solicitor; afterwards the judges established a uniform practice or rule, under which the lien was recognized to the extent of his legal costs or fees allowed to him by law. There is no English case which we have seen that extends the lien farther than this.

In the United States the decisions are not uniform.

In Vermont, New Hampshire, Pennsylvania, Indiana, Illinois, Missouri, Minnesota, Texas, and California, it has been decided by the courts of last resort, that no such lien exists, except for the attorney's costs and fees taxed and allowed by law. And for a claim of the attorney for services, such as that of the appellants, he is left to his remedy against his client upon the contract. While in some of the states, as in New York, Alabama, Georgia, and Florida, and perhaps some others, the attorney's lien is held to extend to his compensation for services, where it is fixed by

contract, or rests upon the principle of *quantum meruit*; and as between the attorney and client, the courts protect the lien of the attorney. In *re Paschal*, 10 Wall. 483, the supreme court have also recognized such lien as existing. That was a case arising between the attorney and his client, and the questions there decided have no application to this case.

In New York, where the lien is recognized to the fullest extent, it has been decided by the court of errors that it cannot be asserted against a party proceeding by a bill in chancery, to obtain a set-off against the judgment of a cross-claim existing when the judgment was rendered. *Nicoll v. Nicoll*, 16 Wend. 446. In that case the decision of the chancellor in *Gridley v. Garrison*, 4 Paige, 647, was reversed.

In Maryland no case involving the question of the attorney's lien has arisen or been decided by the appellate court.

In *Strike's Case*, 1 Bland, 98, a petition was filed by solicitors, claiming to be allowed out of a fund in court, for professional services rendered in the cause; the chancellor dismissed the petition, saying, that "he knew of no practice of this court, or of any analogous proceeding of the English court, which would authorize the introduction of claims of this sort into a cause depending, or about to be disposed of;" and added, "the chancellor must, in all cases, leave the contracts between solicitors and suitors, relative to professional services, to be settled and decided upon in like manner as all other contracts." And this we think is in accordance with sound reason, and the uniform practice in this state. In our opinion the appellants, Messrs. Marshall & Fisher, were not entitled to any lien upon the judgment growing out of their contract with Utterback, or for professional services rendered by them as attorneys in the suit, which they can assert in this case as against the equitable set-off claimed by the appellee. Their rights depend upon the entry made to their use, and they stand in the position of assignees of the judgment, which, as we have before said, is subject to the equitable right of set-off claimed by the appellee.

There was no error in the ruling of the circuit court upon the petition of the appellants, asking that the appellee be required to elect between the proceedings in this cause, and that instituted by him in the circuit court of Fauquier County, against the same parties. It is settled that the pendency of a suit at law in a foreign jurisdiction is no bar to suit for the same cause in this state. *SeEVERS v. CLEMENT*, 28 Md. 434.

In this case it appears that the Maryland defendants, Marshall & Fisher, did not appear in the Virginia suit, refusing to acknowledge the jurisdiction of the Virginia court, while the other appellees, residents of Virginia, have voluntarily appeared in the present suit. We think there is no equitable ground upon which the appellee could be required to make the election.

Upon the whole case, we are of opinion the appellee was entitled to the injunction as prayed, and the order of the circuit court will therefore be affirmed, and the cause remanded, to the end that the injunction may be issued upon the terms prescribed by the order of the circuit court.

*Affirmed and remanded.*

## SUPREME COURT COMMISSION OF OHIO.

(To appear in 27 Ohio St.)

ACTION TO RECOVER FOR INJURIES RESULTING FROM INTOXICATION.  
— LIABILITY OF PERSON CONTRIBUTING TO CAUSE HABITUAL INTOXICATION. — DAMAGES. — STATEMENT OF PHYSICIAN THAT LIQUOR WAS FOR PATIENT, ETC.

## BOYD v. WATT.

1. To constitute a liability under the provisions of the seventh section of the law "To provide against the evils resulting from the sale of intoxicating liquors" (2 S. & C. 1432), before the same was amended, where the action is to recover for injuries resulting from habitual intoxication during a period of years, it is not essential to a recovery that the defendant shall have been the *sole* cause of such habitual intoxication.
2. In such case, where the right of action is for the damages to person, property, or means of support, resulting from such habitual intoxication, one who contributes to cause that condition by his illegal sales, which of themselves tend to, and are calculated to produce that result, is presumed to have intended it, and is liable for the damages resulting, though others may, by their illegal sales, have contributed thereto, without his knowledge, or without preconception with him.
3. Where the damages resulting arise from incapacity for business, and loss of estate, caused by such habitual intoxication, and it becomes impossible to separate the damages caused by others from those caused by the defendant, he is liable for all such damages, if the natural and probable consequence of his illegal acts were to cause such injury.
4. The statement of a physician, who was in the habit of getting intoxicated, made at the times of his purchases of liquor, that he wanted it for a patient, and for medical purposes, does not, in the absence of proof to the contrary, raise the presumption that it is a sale to the patient.

ERROR to the district court of Guernsey County.

*Lucius P. Marsh*, for plaintiff in error. The statute upon which this suit is based will receive a strict construction. The penalties it imposes and the liabilities it creates will not be extended by implication. This rule is elementary. *Hall v. State*, 20 Ohio, 15; *Turner v. The State*, 1 Ohio St. 424; *Moore v. McClief*, 16 Ohio St. 53; *Sprague v. Birdsall*, 2 Cowen, 419; 4 Mass. 145; *Ib.* 473; *Mowson v. Chester*, 22 Pick. 387.

Boyd was only liable for the damages resulting from the sales he made. 2 Hilliard on Torts, 315, sec. 10. The legislature has not the power to punish a man beyond the consequences of his own acts, or acts to which he knowingly contributes.

Watt was a doctor. Some of the whiskey he procured from Boyd, he procured on the representation that he wanted it for a patient. The statute makes Boyd liable for *sales to Watt*. Sales to another, the whiskey being delivered to Watt, are not sales to Watt, and the plaintiff was bound to prove sales to Watt. Such a transaction having no light thrown upon it by other evidence, in the absence of other proof touching such sales, was not a sale to Watt. This legal proposition is plain enough, and the defendant was entitled to a plain and unequivocal charge upon

it. *Wash. Mut. Ins. Co. v. M. & M. Ins. Co.* 5 Ohio St. 450; *Ib.* 275; *White v. Thomas*, 12 Ohio St. 312; *L. M. R. R. Co. v. Wetmore*, 19 Ohio St. 110.

*H. Skinner & J. W. White*, for defendant in error, claimed that when a person contributes, with others, to produce a common injury, by a similar reason he is responsible for the general damage. The rule is that there is no contribution between wrong-doers. This applies to a case where several unite in or contribute to do a common injury, and one is required to pay the damage, he shall not recover back any part from a co-actor, for the reason that such party is severally as well as jointly responsible, and the courts will not aid parties who violate the law. It is no defence to an action sounding in tort that persons who united in or contributed to a wrong, are not united as defendants in an action brought against one of the wrong-doers.

JOHNSON, J. The plaintiff below, Frances Watt, brought this action under section 7 of the liquor law, so called. 2 S. & C. 1432.

She alleges that her husband, Joseph Watt, was a physician, having an extensive practice, and from the profits of that practice was able to furnish her a comfortable means of support; that about April, 1865, he became and was in the habit of getting intoxicated, and so continued until his death in 1869, of which the defendant had notice; that during that period, and at sundry and divers times, the defendant sold him, in quantities of from one pint to a quart, intoxicating liquors, causing said Watt to become intoxicated and an habitual drunkard; and by reason thereof during said period, and resulting therefrom, to become incapable of attending to his usual business, and squandered his estate, and so deprived her of her means of support, to her damage, &c. To this there was a general denial.

On the trial a bill of exceptions was taken, showing that evidence was given by the plaintiff tending to prove the allegations of the petition, and on the part of the defendant tending to show that some of the liquor which Watt drank, producing some of the intoxication during the period named, and which caused a part of the injury which the plaintiff had sustained in her means of support, was sold to Dr. Watt by other persons than the defendant.

The defendant also offered evidence tending to show that Watt was a practising physician, and that on some of the occasions when he procured whiskey from the defendant he represented that he wanted it for persons whom he named, and was attending, for medical purposes, upon which representations the defendant furnished some of the whiskey, and that some of the persons named were sick at the time, and were attended professionally by him.

The defendant asked the court to charge the jury that the defendant was only liable for damages to the plaintiff occasioned by intoxication produced by the intoxicating liquors which the defendant himself had sold to said Dr. Watt, and that the defendant was not liable for any damages produced by the intoxication of said Dr. Watt, occasioned by intoxicating liquors sold to him during said period by other persons; which charge the court refused to give, except as qualified herein; to which refusal the defendant excepted.

The defendant also asked the court to charge the jury, that if Dr. Watt, at any of the times when the plaintiff proved he had procured whiskey from the defendant, represented to the defendant that he wanted the same for a patient whom he was then attending, and for medical purposes, in the absence of any other proof in such behalf, and touching such sales, the jury were not authorized to find that such procurement of whiskey from the defendant was a sale by the defendant to said Dr. Watt, which charge the court refused to give; to which refusal the defendant also excepted.

The qualification of the first charge asked for as given was as follows:—

“Should you find that the defendant sold intoxicating liquor to Joseph Watt in violation of law, within the time charged in the petition, and that the plaintiff sustained damages by reason of the intoxication of said Watt, caused thereby to her person, property, or means of support, the fact that other persons also sold liquor to said Watt, in violation of law, within that period, and which liquor may have contributed to increase the intoxication, and consequently to enhance the injury resulting to the plaintiff therefrom; such facts, if they be shown to have existed, will not exonerate the defendant from the consequence of his wrongful acts; but, on the contrary, he will still be responsible for all the injury resulting to the plaintiff from the intoxication of Joseph Watt, caused by his illegal sales of liquor to him. If you can separate the damages resulting from the intoxication caused by illegal sales to Watt by defendant from the damages resulting from sales by others, you must do so; but, if such separation cannot be made, you will render your verdict against the defendant for all the actual pecuniary damages resulting to the plaintiff in person, property, or means of support, by reason of the intoxication of said Joseph Watt, to which intoxication the illegal sales of intoxicating liquor by the defendant contributed.”

Upon the second point the court charged, that “a sale to any other person, though the delivery was to an agent who was at the time intoxicated, or in the habit of becoming intoxicated, would not be a violation of law if the person to whom the sale was actually made was a sober person.

“If it be shown by the evidence that the defendant sold intoxicating liquor to Joseph Watt, and said Watt was at the time intoxicated, or in the habit of becoming intoxicated, and the defendant had knowledge of such intoxication or habit, the fact that Watt was a physician, and that he at the time represented that such liquor was to be used by him for medicinal purposes, or in the exercise of his profession, would not be a justification of the defendant, nor would it excuse him from the consequence of his act. A sale, under such circumstances, would be a violation of law.

“If you are satisfied by the evidence that the defendant sold intoxicating liquor upon representations made by Joseph Watt that such liquor was designed for another person, and to be used by such person medicinally; and that he delivered the same to said Watt upon such representation and received pay from him therefor; and that said Watt was at the time intoxicated, or in the habit of becoming intoxicated, and the defendant then knew that said Watt was intoxicated, or in the habit of becom-



ing intoxicated, such sale would be a violation of the law, unless the evidence further satisfies you (the burden of proof as to this being on the defendant) that the liquor so sold was actually delivered by Watt to the person for whom he represented it to be designed, or that Watt had been authorized by such person to make the purchase for him."

Under the authority of *Adams v. The State*, 25 Ohio St. 584, we do not feel warranted in examining other parts of the charge of the court below, and therefore proceed to notice the points made by the refusal of the court to charge as requested, and by the charges given covering the same points.

The first proposition which the court refused to give, except with the qualification stated, was, that the defendant was only liable for the damages occasioned by the liquors which he had himself sold, and that he "was not liable for any damages produced by the intoxication of said Dr. Watt, occasioned by intoxicating liquors sold to him during said period by other persons."

In the charge as given, the jury were properly instructed that before they could find for the plaintiff, she must satisfy them by a preponderance of testimony that the defendant sold intoxicating liquor to the husband contrary to the act; that he became intoxicated with the liquor so sold; and that she was injured in her means of support in consequence of the intoxication so induced. This charge, which it is presumed preceded this request to charge, covers the same ground as this special charge asked.

It is a distinct assertoin that the plaintiff's right of recovery rested solely on the illegal acts of defendant, and grew out of the intoxication so induced by him.

It excluded the idea that the defendant could be made liable for damages resulting from the acts of others.

They were told that, before a verdict could be rendered against the defendant, they must find that the plaintiff had been injured in her means of support in consequence of the intoxication of her husband, caused by his illegal sales.

Was it necessary to add, that for any damages produced by liquors sold by others he was not liable? We think not.

The court was careful to limit his liability to the consequences of his illegal acts, and the request upon this point was, in effect, to ask the court to repeat the same charge in different language.

The court, however, did give the charge requested with the qualification stated.

That qualification was, in substance, that if during that period the plaintiff had sustained damages by the illegal sales by the defendant, the fact that during the same period other persons by their illegal sales had contributed to increase the intoxication, and consequently enhance the damages to the plaintiff, that would not exonerate the defendant from the consequences of his illegal acts.

This proposition is apparently so self-evident in its nature that it hardly needs any argument to support it.

It is a well settled principle, that where a person undertakes to do an unlawful act which will result in injury to another, and actually uses the means calculated to do such act, the fact that third persons have also con-

tributed to that result would not exonerate him from the consequences. To this part of the charge, standing alone, there seems to be no objection. It is only when coupled with that which follows, that is, if they could not separate the damages resulting from the intoxication caused by the defendant from those caused by others, then the defendant was liable for all the injury to plaintiff's means of support to which he contributed.

The charge of the court on the subject of damages was intended to meet three possible aspects of the evidence:—

1. If the defendant was the *sole* cause of the intoxication, he was liable for all the damages resulting.

2. If some of the injury was caused by others, he was not liable for damages resulting from their illegal sales.

3. If the damages could not be separated, then he was liable for all injuries to which he had contributed by his illegal sales.

To this last charge the defendant objects. It is claimed to virtually make him liable for intoxication caused by others.

The statute gives the action against "any person who shall . . . have caused the intoxication." This intoxication may be "habitual or otherwise." A right of action is given for damages resulting from single cases of intoxication or from habitual intoxication. Under the Code several distinct causes of action may be joined in one action for damages growing out of distinct cases of intoxication, when each cause of action is separate and distinct and is between the same parties; but if on trial it appears that some of the acts of intoxication were caused by others, no recovery as to them could be had. In such case the causes of action are separate, and the damages resulting from each are distinct and disconnected, and the causes of action should be separately stated and numbered.

In such a case the question would be as to each case of intoxication, who caused it, and what damages resulted from it. What would constitute a causing of a single act under the statute to render one liable would then arise. That question is not made in this case. The charge is of causing *habitual* intoxication for a series of years. The damages alleged are not the proximate results from distinct cases, but the ultimate result of habitual intoxication. This continued habit of drinking is alleged to have rendered the husband incapable of attending to his business, and caused him to squander his estate. This final result deprived the plaintiff of her means of support. It is a charge of repeated illegal acts, producing by their united effects an ultimate *state* or *condition* of Dr. Watt, out of which the damages arise.

The plaintiff asks to recover the damages resulting from this *state* or *condition* of her husband, caused by repeated illegal sales for a series of years, and not the damages from a single case of intoxication, nor of a series of distinct cases at different times, caused by separate and distinct illegal sales.

The means used were sales in quantity by the pint and quart. To a person of Dr. Watt's habits frequent sales in such quantity were calculated of themselves to produce the result complained of.

Every man is presumed to have intended the natural and probable consequences of his acts. The defendant was, in violation of law, using means calculated to produce the alleged injury. If the jury found that

this was so, and that the means so employed were so continued as to produce the condition of the husband alleged, then they had the right to presume he intended the result which followed, though others, with or without preconcert, contributed to cause it.

The intent with which the act or acts are done is always an important element in the case. In this case it is peculiarly so. The means used, the force or agency employed, are to be considered in ascertaining that intent.

If, as seems to be claimed, a defendant can only be liable, except in cases of conspiracy or agreement, when he is not the *sole* cause of the habitual intoxication, and no recovery can be had unless the damages can be separated (an impossibility in most cases of this class), then this part of the statute is virtually a dead letter.

Why should a defendant be exonerated from the injury he has caused by his habitual wrongs for a series of years by showing that others, without his knowledge, have also contributed by like means to this result? He was using adequate means to produce the result, and may, therefore, fairly be presumed to have intended it. True, he may not have enjoyed a monopoly in the profits accruing, by reason of the competition of others in a common business, but that certainly is no reason why he should not be liable for the injuries he was intentionally engaged in causing. If such is the law, then he could take advantage of his own wrong by showing that during these four years another or others had also contributed.

Such is not the law in criminal cases at common law, as will be shown hereafter; and we know no reason for greater strictness under this statute than in cases of the highest crimes known to the law. This section of the statute, we take it, is to be construed by ordinary canons of construction.

All joint *tortfeasors* are jointly or severally liable, at the election of the plaintiff. 1 Chitty's Plead. 86; 6 Taunton, 29; 1 Wash. 187.

Counsel properly admit that where two or more act by concert in an unlawful design, each is liable for *all damages*; but claim if each acts independently, or without the knowledge of the other, then he is only liable for his own acts. In the former case, the acts of others coöperating are his acts, because they are only in furtherance of a common unlawful design.

If there is no common intent, there can be no joint liability, but each is responsible for his own act. If there is a common intent, or if one without such intent aids one with it, in doing an unlawful act, the latter is nevertheless guilty, though not the *sole* cause. They claim this principle is limited to cases of conspiracy or concerted action.

In this we think they mistake the authorities. We hold that this common intent, which is sufficient to create mutual liability, may exist without previous agreement, or a common understanding to do an unlawful act, and that it may be presumed to exist, when the means employed creates that presumption, as well as by proving an express agreement.

Wharton, in his recent work on Negligence, under the head of "Causal Connections," section 144, says: "The fact that another person contributed either before the defendant's interposition, or concurrently with such interposition in producing the damage, is no defence."

So, if two trains of cars collide by mutual negligence of those operating them, they are jointly or severally liable. *Colegrove v. N. Y. & N. H. R. R.* 20 N. Y. 492.

To constitute parties co-wrong-doers, it is not necessary to show they acted by preconcert, if they were intending to do the same injury, and were acting simultaneously in its accomplishment. In such case they are jointly and severally liable.

This precise question was considered in *Stone v. Dickinson*, 5 Allen, 29. Nine different creditors wrongfully sued out writs against their debtor; placed them in hands of the same officer, who arrested the debtor on all the writs at the same time; each creditor being ignorant of what the other was doing; it was held they were jointly or severally liable, though there was no preconcerted action.

Bigelow, C. J., says: "As a matter of first impression, it would seem . . . they could not be regarded as co-trespassers, in the absence of proof of an intention to act together, or of knowledge that they were engaged in a common enterprise.

"But a careful consideration of the nature of the action and of the wrong done . . . will disclose the fallacy of this view of the case.

"The wrong which constitutes the gist of the action is, that he has been unlawfully arrested. . . . It is only one wrong. The error consists in supposing that the several parties . . . cannot be regarded as co-trespassers, because it does not appear that they acted in concert, or knowingly employed a common agent. Such preconcert or *knowledge* is not essential to the commission of a joint trespass.

"*It is the fact that they all united in the wrongful act, or set on foot or put in motion the agency by which it was committed, that renders them jointly liable to the person injured.*"

"The fault of a mere stranger, however much it may contribute to the injury, is no defence for one whose negligence helped to bring the accident about." Shearman & Redf. on Negligence, sections 27 and 46, and cases cited.

"Persons who coöperate in an act directly causing injury are jointly liable for its consequences, if they act in concert, or *unite in causing a single injury, even though acting independently of each other.*" *Ib.* section 58.

The same principle obtains in criminal law: "If a party be engaged in an unlawful act, and another assists him, and actually perpetrates the mischief, the first party shall be held responsible as though he had been sole perpetrator. . . . Upon the same principle it is that he is responsible to the same extent, though the fatal blow be struck by another *without any concert on his part.*" *Butts v. The State*, Meigs (Tenn.), 108; 1 Bishop Crim. Law, sec. 642.

In such cases the party charged is held liable for causing the injury, though not the *sole* cause.

If the defendant was using the means calculated to produce the injury, the law presumes he intended to produce it. If others, with or without concert, were concurrently coöperating with him, using like means, they were acting with the same common design; and if the injury resulted, each is liable, though each was acting without the knowledge of what the

other was doing. So if the defendant alone was using such means as created this presumption of intent to do the act, and another, without concert, free from such intent, was contributing to the injury, the former is liable for all damages, notwithstanding the other also contributed.

If the defendant's illegal sales were, under the circumstances, sufficient in quantity and frequency to cause habitual drunkenness, he is engaged in an unlawful act, and liable for the consequences, though others, without preconcert, united in causing it. Such is the uniform rule in this class of cases.

This principle of law is so strongly supported by both reason and authority, that it will hardly be questioned. Nor is it in conflict with numerous authorities in cases of trespassing animals belonging to different owners. Separate owners are not at common law jointly liable for injuries jointly committed by their respective animals, though all happen as parts of a single transaction. In such cases each owner is liable only for the injuries committed by his own animal, because of his negligence in permitting it to run at large. This *neglect* is the ground of the owner's liability. As the animals are supposed to be under the separate control of each owner, and his negligence is distinct from that of the other, and not in furtherance of a common object, they cannot be jointly liable, because the wrongful neglect of each is wholly independent, and the damages are not the direct result of the act. There is no concurring agency of the owners in the trespass.

If, however, the separate owners of such animals keep them in common, and suffer them to run at large as one herd or body, then they are jointly liable for all damages, by the united trespasses of all or any of the animals. *Jack v. Hudnall*, 25 Ohio St. 255.

The fact that the amendment to this section by the Adair law uses the words, "in whole or in part," is referred to as evidence that the original section was limited to intoxication "caused in whole." To this we answer: 1st. As already shown and admitted by counsel, joint wrongdoers were liable for each other; 2d. This clause of the Adair law was doubtless inserted to put at rest an open question, one about which there was much difficulty and difference of opinion in different parts of the state.

2. It is claimed the court erred in refusing to charge: That if Dr. Watt, at any time when he procured whiskey from the defendant, represented that he wanted it for a patient he was attending, and for medicinal purposes, the jury were not authorized to find such procurement was a sale, in the absence of any other proof touching such sale.

We think there was no error in refusing this charge. If the plaintiff offered evidence tending to show a sale, which to Dr. Watt was illegal *prima facie*, the burden of showing it was not rested on the defendant, and this was not shown by the mere declaration of the purchaser. The jury were told that a sale to any other person, though a delivery to an agent who was intoxicated, or in the habit of becoming so, would not be illegal if the person for whom the agent was acting was a sober man. Had the defendant shown that the whiskey so procured was a sale to the doctor's patients, he acting as their agent, he would come within this charge. His declaration that it was for his patients, even if true, did not

constitute a sale to the patient, any more than his purchase of drugs to be used in his practice is necessarily a sale to his patients.

*Judgment affirmed.*

SCOTT Chief Judge, DAY and WRIGHT, JJ., concurred.

ASHBURN, J., dissenting. Not agreeing with my brethren as to the first, second, and third propositions, I will give my reasons.

The alleged error arises upon an instruction asked by Boyd, — refused; and the instruction given by the court in place of the one asked.

Charge asked and denied.

The defendant asked the court to charge the jury, that "the defendant was only liable for damages to the plaintiff occasioned by intoxication produced by the intoxicating liquors which the defendant himself had sold to said Dr. Watt, and that the defendant was not liable for any damages produced by the intoxication of said Dr. Watt occasioned by intoxicating liquors sold to him during said period by other persons," which charge the court refused to give except as qualified herein.

So much of the charge given in place of the one overruled was:—

"If you can separate the damages resulting from the intoxication caused by illegal sales to Watt by defendant from the damages resulting from sales by others, you must do so; but if such separation cannot be made, you will render your verdict against the defendant for all the actual pecuniary damages resulting to the plaintiff in person, property, or means of support, by reason of the intoxication of said Joseph Watt, to which intoxication the illegal sales of intoxicating liquor by the defendant contributed. You will award exemplary damages, however, against the defendant only for his own wrongful acts, and not for the wrongful acts of others."

Defendant excepted to the entire charge and every part thereof.

The plaintiff, in her petition, alleges that her husband, Dr. Watt, died in September, 1869; that from the month of April, 1865, to about the time of his death, Boyd sold him intoxicating liquors in quantities from a pint to a quart; caused him to become intoxicated, and an habitual drunkard. In consequence he neglected his business and squandered his estate. She had to provide for herself, and was injured in her means of support.

The charges in the petition are such as to lay the foundation for the assessment of the twofold damages provided for in the statute: viz., compensatory and exemplary.

The jury returned a verdict in favor of the plaintiff for two thousand five hundred dollars. Was the instruction given to the jury in lieu of the one asked and refused the law of the action? I think not.

The action was prosecuted under the Ohio liquor law of 1854. Section 3 provides, "that it shall be unlawful for any person . . . to sell intoxicating liquors to persons intoxicated, or who are in the habit of getting intoxicated." . . . .

For the violation of this section a person may be indicted, fined, and imprisoned.

Section 7 provides, "That every wife . . . who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, such wife . . . shall have a right of action in her own name against any per-

son who shall, by selling intoxicating liquors *contrary to this act*, have caused the intoxication of such person, for all damages *actually* sustained as well as exemplary damages."

The charge of the court complained of relates only to the question of assessing "damages actually sustained," and not to exemplary damages. The rule as to the assessment of exemplary damages was narrow, and not calculated to injure Boyd; whilst the rule given them by which, in case of difficulty, they should estimate and assess *actual* or compensatory damages, was too broad and uncertain, calculated to mislead the jury, and oppressive.

To render the defendant liable for damages under the provisions of this statute, when correctly construed, he must, under section 3, be guilty of a crime in selling intoxicating liquors to one then intoxicated, or to one in the habit of getting intoxicated. Criminal liability is the foundation for a civil liability; then, under section 7, before liability arises, there must not only be an unlawful sale to one then intoxicated, or one in the habit of getting intoxicated, but he, by his sale of intoxicating liquor "in violation of this act," must have caused the intoxication, in consequence of which she sustained "actual" damage to her means of support. And as the law now stands in Ohio, his criminality for violation of section 3 must be made to appear beyond a reasonable doubt, as a basis for civil liability in damages. Boyd's criminality being made to appear beyond a reasonable doubt, damages may be assessed upon a preponderance of proofs. The person charged must not only be guilty of violating the criminal provision of the statute, but must be criminally responsible to the extent that *he caused the intoxication* by and in consequence of which a party is damaged. The statute does not say if he shall *contribute* to the intoxication of a person, and another is damaged thereby, he shall be in some event responsible for all damages. Does it mean this? Is that the responsibility intended by the statute? The court answers in the affirmative. This is not the language of the statute, nor, in my opinion, is it the meaning.

To hold one person responsible for the criminal acts of another, in the absence of a statute to that effect, in the absence of all question of conspiracy or confederation, appears to me to be a violation of the cardinal principles of law and justice. The charge to the jury, given in this case over the objection of Boyd, did that, unless I am mistaken in the force of the instruction given and the construction of the statute. It will not be controverted that this statute is an innovation upon the common law rights and liabilities. It is no statutory embodiment of an old right, but creates a new cause of action and provides an unusual remedy. Such statutes, unless the intent otherwise clearly appears from the statute, should be strictly construed, and limited in their operation to the express words, when they are clear. No canon of construction authorizes the court to indulge in presumptions as to what such statutes mean. Courts are not authorized to legislate an intention into a statute. They must take it as they find it, not adding to nor subtracting from it.

Smith in his work on Statutory Construction, page 830, says: "When the object of the legislature is plain, and the words of the act unequivocal, courts ought to adopt such a construction as will best effectuate the intention of the law-makers; but they must not, even in order to give effect to what

constitute a sale to the patient, any more than his purchase of drugs to be used in his practice is necessarily a sale to his patients.

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Section 7 provides, "That every wife . . . who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, such wife . . . shall have a right of action in her own name against any per-



son who shall, by selling intoxicating liquors *contrary to this act*, have caused the intoxication of such person, for all damages *actually* sustained as well as exemplary damages."

The charge of the court complained of relates only to the question of assessing "damages actually sustained," and not to exemplary damages. The rule as to the assessment of exemplary damages was narrow, and not calculated to injure Boyd; whilst the rule given them by which, in case of difficulty, they should estimate and assess *actual* or compensatory damages, was too broad and uncertain, calculated to mislead the jury, and oppressive.

To render the defendant liable for damages under the provisions of this statute, when correctly construed, he must, under section 3, be guilty of a crime in selling intoxicating liquors to one then intoxicated, or to one in the habit of getting intoxicated. Criminal liability is the foundation for a civil liability; then, under section 7, before liability arises, there must not only be an unlawful sale to one then intoxicated, or one in the habit of getting intoxicated, but he, by his sale of intoxicating liquor "in violation of this act," must have caused the intoxication, in consequence of which she sustained "actual" damage to her means of support. And as the law now stands in Ohio, his criminality for violation of section 3 must be made to appear beyond a reasonable doubt, as a basis for civil liability in damages. Boyd's criminality being made to appear beyond a reasonable doubt, damages may be assessed upon a preponderance of proofs. The person charged must not only be guilty of violating the criminal provision of the statute, but must be criminally responsible to the extent that *he caused the intoxication* by and in consequence of which a party is damaged. The statute does not say if he shall *contribute* to the intoxication of a person, and another is damaged thereby, he shall be in some event responsible for all damages. Does it mean this? Is that the responsibility intended by the statute? The court answers in the affirmative. This is not the language of the statute, nor, in my opinion, is it the meaning.

To hold one person responsible for the criminal acts of another, in the absence of a statute to that effect, in the absence of all question of conspiracy or confederation, appears to me to be a violation of the cardinal principles of law and justice. The charge to the jury, given in this case over the objection of Boyd, did that, unless I am mistaken in the force of the instruction given and the construction of the statute. It will not be controverted that this statute is an innovation upon the common law rights and liabilities. It is no statutory embodiment of an old right, but creates a new cause of action and provides an unusual remedy. Such statutes, unless the intent otherwise clearly appears from the statute, should be strictly construed, and limited in their operation to the express words, when they are clear. No canon of construction authorizes the court to indulge in presumptions as to what such statutes mean. Courts are not authorized to legislate an intention into a statute. They must take it as they find it, not adding to nor subtracting from it.

Smith in his work on Statutory Construction, page 830, says: "When the object of the legislature is plain, and the words of the act unequivocal, courts ought to adopt such a construction as will best effectuate the intention of the law-makers; but they must not, even in order to give effect to what

the civil liability springs out of a criminal responsibility, a person, in answering for his own wrongful act, cannot be lawfully held to answer, in damages, for the criminal acts of others. Yet the charge given to the jury in this case over the objection of Boyd made him conditionally liable for the wrongful acts of others; even more, responsible for the criminal acts of, perhaps, unknown persons. The charge made this conditional liability to rest upon the *ability* of the jury, from the proofs in the action, to determine in dollars the value of the wrongful acts of Boyd. If, from a preponderance of the proofs on the question of the amount of damages sustained by Mrs. Watt, the jury were unable to determine the actual amount of damage occasioned by the wrongful act of Boyd, then, in that case, they might lawfully charge Boyd with the unnumbered sins of unnumbered persons for a series of years — from 1865 to Dr. Watt's death in 1869. I cannot think the statute will bear the construction given to it by the court of common pleas. If the legislature had intended such a result, such purpose would have been more clearly expressed.

- I will illustrate the practical effect of the charge given to the jury, as
- I understand it. A, on the 1st day of January, 1868, sold a pint of whiskey to Dr. Watt, who paid for it — Mrs. Watt needed that money to buy bread; on the 10th of January, B sold brandy to Watt, and for which he paid the money, and Mrs. Watt needed that money to pay for meat to eat; on the 20th of January, C sold a quart of whiskey to Watt, and received money in payment, and on the 30th day of January, the defendant sold Watt spirituous liquors for cash, and Mrs. Watt needed that money to purchase raiment for herself. On each occasion Watt became intoxicated, and wasted so much of plaintiff's means of support as he expended money in the purchase of the liquor, and loss of time while so intoxicated. Mrs. Watt prosecutes an action against the defendant for damages to her means of support. The court instructs the jury: "If you can separate the damages resulting from the intoxication caused by illegal sales to Watt by defendant from the damages resulting from the sales by A, B, and C, you must do so; but if such separation cannot be made, you will render your verdict against the defendant for all the actual pecuniary damages resulting to the plaintiff in *person, property*, or means of support, by reason of the intoxication of said Joseph Watt, to which intoxication the illegal sales of intoxicating liquor by defendant contributed. You will award exemplary damages, however, against defendant only for his own wrongful acts, and not for the wrongful acts of A, B, and C." If the charge does not mean this, then I am unable to discover its meaning. If a charge is so uncertain that it is likely to mislead the jury, the judgment should be reversed.

It is claimed that the case of *Henry D. Stone v. William Dickinson*, 5 Allen, 29, supports the views taken by the majority of the court. I am of a different opinion. In that case, nine writs for the arrest of plaintiff were sued out by nine different persons, who, separately and without concert, and, without knowing they were using the same agent, placed them in the hands of the same person, and caused plaintiff to be arrested. The plaintiff brought several suits for compensation. The court held that having used a common agent, and made but a single arrest, they were

joint trespassers, and a satisfaction from one of them was a bar to an action against the other joint trespassers. The court assimilated the case to a common law joint action for trespass. The reasons of the court for doing so may or may not be sound. How would the case have stood if the agent who made the single arrest under all the writs had, at distinct hours of the day, or on different days, arrested the plaintiff? Would the several arrests have been a joint trespass? Certainly not. The judge puts the case upon the fact: "It is only *one* wrong, for which in law he can receive but one compensation. He has not in fact suffered nine separate arrests, and undergone nine separate imprisonments," &c. This case will only be analogous to the one under consideration when it shall occur that nine separate liquor vendors shall put nine parcels of intoxicating liquors into the hands of an agent, but without concert of action or knowledge that they are employing the same person, and shall cause the nine parcels of liquor to produce a single case of intoxication from which damages arise, and the common agent by so doing is rendering each of his principals liable to a criminal prosecution.

This charge is erroneous in another respect. Two distinct rules were given to the jury for the assessment of damages. They were told in a certain contingency, when assessing "actual pecuniary damages," to look to the wrongful acts of defendant and others, and from them, in the aggregate, determine the plaintiff's damages to her means of support; but when the jury come to assess exemplary damages, they could look only to the defendant's wrongful acts, and not the wrongful acts of others. This rule for assessing exemplary damages is sound law, but it serves to show the error in the other part of the charge. To me the doctrine is strange that the field of facts from which compensatory damages in a given case can be collected is broader than that from which punitive damages may arise.

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CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

[OCTOBER, 1876.]

BANKRUPTCY. — ATTACHMENT OF STATE COURT DISSOLVED BY PROCEEDINGS IN BANKRUPTCY.

BRACKEN, assignee, v. JOHNSTON.

1. An attachment of the property of a debtor is *ipso facto* dissolved if proceedings in bankruptcy are commenced within four months thereafter upon which the debtor is adjudicated a bankrupt. Rev. Stats. sec. 5044: Sec. 14 of original bankrupt act.
2. A creditor who proceeds in a state court by a writ of attachment on which he seizes the property of his debtor and realizes his judgment obtained in such a suit by a sale of the property attached, is liable to the assignee in bankruptcy of the debtor appointed under proceedings commenced in the bankruptcy court within four months of

the levy of the attachment, although the assignee did not appear or defend the attachment suit or make any attempt to arrest the attachment proceedings.

8. The case distinguished from *Wilson v. City Bank*, 17 Wall. 473, and *Eyster v. Gaff*, 91 U. S. Rep. (1 Otto) 521.

THIS case comes before the circuit court on a writ of error to the district court. The plaintiff in error as assignee of Browne, a bankrupt, sued the defendant Johnston for the value of goods seized under a writ of attachment against Browne in favor of Johnston in the state court, and sold under the proceedings in that case for Johnston's debt. The district court, to which the case was submitted without a jury, made the following finding of facts, and conclusions of law, on which it rendered judgment in favor of defendant.

1st. Wm. P. Browne, the bankrupt, resided at Tama County, Iowa, where also live the parties to this suit. On the 23d of September, A. D. 1872, defendant Johnston commenced suit against Browne in the district court of Tama County, upon an alleged indebtedness, due upon the sale of grain, and sued out of said court in said suit a writ of attachment, which, under the direction, and by the personal procurement of the defendant Johnston, was levied upon property described in the petition.

2d. That on the 21st day of January, A. D. 1873, and within four months of the suing out of said attachment, a petition in bankruptcy was filed by certain of Browne's creditors in the United States district court, from whence this suit comes, praying that said Browne be adjudged a bankrupt.

3d. That on the said 21st day of January, A. D. 1873, Browne was served with the original notice in the suit pending in the state court.

4th. That on the 25th day of January, A. D. 1873, the order to show cause in the bankruptcy proceedings was duly issued, was served on the 8th day of February, A. D. 1873, and on the 14th day of February, A. D. 1873, the said Browne was, by order of the court sitting in bankruptcy, duly adjudged a bankrupt.

5th. On the 18th day of February, A. D. 1873, Browne, the bankrupt, filed in the district court of Tama County his answer in the suit brought against him by Johnston, contesting the claim upon which the suit was founded. On the 25th day of February, A. D. 1873, a trial was held in that court, when the issue above joined was found for the plaintiff Johnston, and a judgment rendered in his favor for \$2,264.<sup>18</sup>/<sub>100</sub> and costs, and an order for a special execution to sell the attached property.

6th. On the 28th day of February, A. D. 1873, special execution was issued, which, under the direction and procurement of Johnston, was levied upon the attached property, as the property of Browne, and afterwards on the 22d day of March, A. D. 1873, the sheriff, under Johnston's direction, sold the property as belonging to Browne. That Johnston was present at the sale, bid upon some of the property offered, and received from the sheriff the avails of the sale. That the proceeds amounted to \$2,349.<sup>40</sup>/<sub>100</sub>, and the costs of the suit and sale were \$177.<sup>50</sup>/<sub>100</sub>.

7th. That on the same 22d day of March, A. D. 1873, plaintiff was duly elected and qualified as assignee in bankruptcy of the estate of said Browne, and received his deed of assignment as provided by law.

8th. That afterwards, and previous to the commencement of this suit,

plaintiff in error made demand upon said Johnston for a return of said property, which demand was refused, and this action commenced.

9th. That at the time Johnston sued out the attachment, he had reasonable cause to believe Browne was insolvent.

10th. That defendant directed the sheriff in the levy of the attachment and execution, and that if Johnston is otherwise liable, his direction and control over the sheriff sufficiently appears. The court below found as conclusions of law : —

1st. That the jurisdiction over the property acquired by the state court in the attachment proceedings was not divested by the bankruptcy proceedings.

2d. That under the judgment and order of the state court the property attached was adjudged to be the property of the defendant in that case, Browne; and that his assignee in bankruptcy is estopped from questioning such adjudication, and that defendant Johnston obtained a good title to the said property under said sale, and that he is not liable to plaintiff in this action for either the property or its proceeds.

3d. I find the defendant is entitled to judgment for costs in this case against the plaintiff. The plaintiff sued out a writ of error.

MILLER, Circuit Justice. The question thus presented to me for consideration is very clear and simple in its statement, but none the less difficult of solution. It is whether a party proceeding by a writ of attachment, and seizing the goods of his debtor and realizing by judgment and sale under execution the whole or a part of his debt, is liable to an assignee in bankruptcy of the debtor appointed under proceedings instituted in the bankruptcy court, within four months of the levy of attachment, though no appearance or defence was made by the assignee in the attachment proceeding, or any attempt to arrest them. I say the question is one not easy of solution, because it occupies debatable ground in which two important principles of the bankrupt law seem to come in conflict. Namely: the principle that no person shall by a writ of attachment against the bankrupt obtain a preference for his debt over other creditors, unless issued more than four months before the commencement of the bankrupt proceedings; and the principle that the state courts are not divested of their jurisdiction of cases pending in them by the initiation of bankruptcy proceedings against one of the parties to such a suit, unless it be brought to the notice of the state court by some appropriate proceeding in that case.

The first principle rests upon the language of sec. 5044 of the Revised Statutes, which is part of sec. 14 of the original bankrupt law. It reads as follows: "As soon as the assignee is appointed and qualified, the judge, or when there is no opposing interest, the register shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers, relating thereto; and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same has been attached in *mesne process* as the property of the debtor, and *shall dissolve any such attachment made*

within four months, next preceding the commencement of the bankruptcy proceedings."

The other principle rests upon the fact in this case, that no attempt was made by the assignee, or any one else, to bring to the notice of the state court the fact that the debtor had been declared bankrupt, and that it proceeded in its usual course to judgment, and execution of that judgment, without any apparent error or defect of jurisdiction in these proceedings; and upon certain opinions of the supreme court sustaining its right to do so.

If there can be found any middle ground by which both these principles can be left by their just and proper operation, we ought to adopt it in the solution of this case. I think there is such a ground. The two opinions of the supreme court, in which the authority of the state courts has been most firmly sustained, was probably delivered by myself. I mean the case of *Wilson v. The City Bank*, 17 Wall. 478, and the case of *Eyster v. Gaff et al.* 91 United States Sup. Court Rep. (1 Otto) 521.

But in both these cases the proceedings of the court which were upheld were the exercise of the regular and ordinary powers of the court in rendering a judgment or decree against the party before it. And I still adhere to the doctrine that if, by the usual processes of the court, a plaintiff procures a judgment against the bankrupt, which judgment is of itself a lien, or by virtue of the levy of an execution becomes a lien, before the commencement of the bankruptcy proceedings, that lien must prevail; or when the state court, in pursuance of a jurisdiction invoked before the bankruptcy proceeding commenced, enforces a lien which has by the bankrupt law itself a priority over other creditors, as a mortgage or other specific lien, its proceedings are valid and effectual, notwithstanding the commencement of proceeding in bankruptcy while they are pending. But there is a very marked difference in the favor with which such a lien should be regarded, and a lien obtained by the extraordinary and summary proceeding of attachment, in which the plaintiff, being made aware of the failing condition of his debtor, takes the remedy into his own hands, and by an *ex parte* proceeding appropriates by his own volition the debtor's property to the exclusive payment of his own debt. And it was precisely this proceeding which the provisions I have cited from the bankrupt law was intended to prevent, by declaring that all such attachments are dissolved by the assignment of the bankrupt's property, unless made within four months next preceding the commencement of the bankrupt proceedings.

The purpose of the act was to put a creditor who undertook to secure a lien by attachment in precisely the same condition as one who took a preference or lien by the consent of the debtor. In both cases the creditor proceeded at his own hazard. If the debtor escaped the bankruptcy court for the prescribed time, the preference or lien remained valid. If he did not, it is void absolutely. The language of the section I have cited is very strong in this direction, if, to repel the idea that the attachment is merely voidable, it is declared that the making of the deed to the assignee shall by operation of law vest title to property in the assignee, and dissolve any attachment made within the four months. I think this was intended

to mean that in the contingency mentioned the attachment was *ipso facto* dissolved, and the property attached became freed from the effects of the suit, and that it required no judicial proceeding to restore it to that condition.

This view of the matter does not divest the court in which the attachment suit is pending of its jurisdiction over the case and the parties. It merely declares that the title to the attached property having been vested by written judicial proceeding in the assignee, the lien of the attachment is at an end.

The court can proceed to judgment against the party, and can issue its execution. If property liable to it can be found, it can be enforced. If not, it is like the judgment in any other case against a debtor without means. And there is no hardship in this, for the reason that the attaching creditor was informed by the provisions of the bankrupt law that he initiated his attachment proceeding subject to its being rendered ineffectual by proceedings in bankruptcy within four months. This view, I think, reconciles the two opposing principles. It leaves the general jurisdiction of this state court, or any other court in which the attachment suit is pending, unaffected; and it can proceed as if no bankruptcy proceeding had been commenced, and its judgment is valid in every other respect, except that the lien on the property is gone. It gives full effect to the purpose of the bankrupt law, that no such attachment shall prevail, when instituted within four months before that law is called into operation, and in subordination to which principle the attaching creditor instituted his proceedings. The present case very forcibly illustrates the necessity of adopting this rule, if full effect is to be given to the provision of the bankrupt law, for the finding of facts shows that though the bankrupt proceedings were instituted within four months after the levy of the attachment, the assignee was *not* appointed until the very day the property was sold under Johnston's execution. It was therefore impossible that the assignee could have interposed at any stage of the proceeding in the state court to bring to its notice the bankrupt proceedings, or to procure an order dissolving the attachment, and the creditors whom he represents were without remedy, notwithstanding the positive declaration of the bankrupt law. I am of opinion that, in the facts found by the district court, the defendant Johnston was liable for the value of the goods as evidenced by the sum for which they sold. The judgment of the district court is reversed, and the case is remanded to the district court with directions to enter a judgment against him accordingly.

## SUPREME JUDICIAL COURT OF MASSACHUSETTS.

(To appear in 120 Mass.)

INVALIDITY OF CONTRACTS BETWEEN CITIZENS OF BELLIGERENT STATES.  
— CONSTRUCTION OF ACTS OF CONGRESS, ETC., TOUCHING INTER-  
COURSE DURING THE REBELLION.

SNELL v. DWIGHT.

The provisions of the U. S. St. of 1864, c. 225, §§ 8, 9, and of the treasury regulations of July 29, and September 24, 1864, respecting purchases of the products of the then insurgent states, and commercial intercourse with their inhabitants, did not authorize any such intercourse, excepting by the agents of the United States appointed to make such purchases. Nor did they authorize such agents to contract for such products with citizens of the states not in rebellion, nor for such products not, at the time of the contract, actually owned or controlled by the vendor.

Under the U. S. St. of 1864, c. 225, §§ 8, 9, and the treasury regulations of July 29, and September 24, 1864, no officer of the United States government, civil or military, had authority to grant permission to any person to take goods beyond the lines of the military occupation of the United States, for trade or exchange for the products of the insurgent states.

A bill in equity cannot be sustained by one of the parties to a contract for illegal trading with inhabitants of states declared in insurrection against the United States government, against another party to such contract, for an account of resulting profits.

BILL IN EQUITY by Thomas Snell, Samuel S. Keith, and Abner Taylor, members of the firm of Snell, Taylor & Co., against Daniel A. Dwight, Benjamin F. Nourse, and George M. Gill, for an account. Hearing before Ames, J., who ruled that the bill could be maintained, and referred the case to a master. The defendants appealed. The facts of the case appear in the opinion.

*A. A. Ranney*, for the plaintiffs,

*C. B. Goodrich & E. F. Hodges*, for the defendants.

ENDICOTT, J. In March, 1865, the defendant George M. Gill made an agreement with Samuel Tate to bring a steamboat into the Yazoo River in Mississippi, within the Confederate lines, laden with supplies to be exchanged for cotton. Tate was to furnish the cotton, in payment for the supplies, under an arrangement which he had made with the Confederate government through its cotton agent, and he was to receive one half the profits of the transaction. On March 7, 1865, Gill made a contract in writing with the plaintiffs, the owners of the steamboat S. B. Young, then lying at Memphis and laden with supplies, to proceed up the Yazoo River, and execute the agreement made with Tate. This contract purports to be made on the one part by Snell, Taylor & Co., the plaintiffs, and on the other by the defendants, under the name of Dwight, Gill & Co. The contract also recites that Dwight, Gill & Co. have contracted with Charles H. Ray, of Chicago, for the use of permits issued to him by the President of the United States, to enable them to take the goods beyond the military lines of the United States. The details of the contract, prescribing the manner of its execution, the sum to be paid for the sup-



plies, and the share of the profits to be paid the plaintiffs for the use of their boat and other services, it is not important to recite.

Under this contract the boat proceeded under the charge of Gill up the Yazoo River, beyond the military lines of the United States, and obtained from Tate, in exchange for the supplies, two hundred and seventy-five bales of cotton. She also took on board as freight, on account of Tate and others, four hundred and twenty-four bales of cotton, making a total cargo of six hundred and ninety-nine bales, which she conveyed to St. Louis.

The plaintiffs bring this bill, alleging that the two hundred and seventy-five bales of cotton were taken and disposed of by the defendants, and praying for an account, and that the defendants may be compelled to pay over to the plaintiffs the money and profits which they are entitled to receive by the terms of their contract. The defendants, among other defences, set up that the contract was unlawful, and the plaintiffs can have no remedy under it.

The parties contemplated by their contract, and, in its execution, actually carried on trade and had commercial intercourse within a state in insurrection against the laws of the United States. By the act of Congress, passed July 13, 1861, and the proclamation of the President in pursuance thereof, August 16, 1861, all commercial intercourse by and between the states in rebellion and the citizens thereof and citizens of the rest of the United States was declared to be unlawful. A state of war was thus declared by competent authorities to exist. U. S. St. 1861, c. 3, § 5; 12 U. S. Sts. at Large, 257. See *Kershaw v. Kelsey*, 100 Mass. 561, and cases cited. At the time this enterprise was undertaken, it was therefore illegal, unless the plaintiffs can show that it was duly authorized and permitted by the authorities of the United States, in conformity to the provisions of the statutes allowing commercial intercourse with the enemy under certain restrictions and regulations.

It is contended by the plaintiffs that the defendants were licensed to proceed up the Yazoo River and procure the cotton under certain permits issued by the authorities of the United States and duly assigned to them. These permits are three in number, and are known and referred to in the record as the Ray, Topp, and Swett permits.

Before considering the character of these licenses, it is necessary to examine how far trade could be permitted with the citizens of states in rebellion, under the statutes and regulations then in force.

Under the U. S. St. of 1861, c. 3, § 5, the President could license and permit commercial intercourse with any such part of the section of a state declared to be in insurrection, as he in his discretion might think conducive to the public interest; and such intercourse, so far as licensed by him, was to be carried on in pursuance of rules prescribed by the secretary of the treasury. In the rules as revised and published, September 11, 1863, by the secretary of the treasury, rule VII. provided as follows: "Commercial intercourse with localities beyond the lines of military occupation by the United States forces is strictly prohibited, and no permit will be granted for the transportation of any property to any place under the control of insurgents against the United States." So far as that act

and the regulations under it are concerned, there could be no license to trade on the Yazoo River as provided in the contract.

The act passed July 2, 1864, c. 225, § 8 (13 U. S. Sts. at Large, 377), provided that the secretary of the treasury might "authorize agents to purchase for the United States any products of states declared in insurrection, at such places therein as shall be designated by him, at such prices as shall be agreed on with the seller, not exceeding," &c. The treasury regulations, issued July 29, 1864, rule III., declared, "Commercial intercourse with localities beyond the lines of actual military occupation by the United States forces is absolutely prohibited, and no permit will be granted for the transportation of any property to any place under the control of insurgents." This rule is substantially the same as rule VII. promulgated September 11, 1863.

Additional regulations under this act were issued September 24, 1864, providing for the appointment of agents to purchase for the United States the products of states declared to be in insurrection, at certain designated places, all of which were within the federal lines, and for certain prices and on certain terms of payment set forth in the regulations. These agents were required by rule VII. to purchase all such products offered to them, but not to assume any liability on account of the government previously to their delivery other than by a stipulation to purchase products "owned or controlled by applicants." The form of the stipulation is annexed to the regulation, and is a certificate that the agent has "agreed to purchase," &c. The regulations also recite with great minuteness the duties of agents in regard to the products delivered under the certificate of purchase, the terms on which they shall be sold, and the records to be kept of all transactions. And in rule VIII., whenever any person shall make application to the purchasing agent setting forth that he owns or controls such products, the agent is directed to give him a certificate that such application had been made, and request safe conduct for such applicant and the necessary transportation.

On the same date the President issued his proclamation, reciting the act of Congress and the regulations of the treasury department, in which it is declared that all persons having in their possession such products, and all persons owning or controlling such products, are authorized to convey them to either of the designated places of purchase, and such products shall not be liable to detention, seizure, or forfeiture while *in transitu*. And it also declared that persons who have so sold and delivered products to agents, as provided by the regulations, and having a certificate thereof, may purchase at the place of sale, or in any other place in a loyal state, any articles not contraband of war nor prohibited by the war department, to an amount not exceeding in value one third the aggregate value of the products so sold by him to the agent; and "articles so purchased may be transported by the same route and to the same place from and by which the products sold and delivered reached the purchasing agent," and such articles are to have safe conduct by military and naval officers to the said places and by the same route.

The regulations and proclamation of September 24 do not conflict with the regulation of July 29, which prohibits trade with localities beyond the military lines of the United States, and declares that no permits shall be

issued for the transportation of property to any place under the control of insurgents. The regulations are to be construed together, and the provision of July 29 is so far modified, that purchases may be made through agents, from persons residing in the insurrectionary states, and property may be transported thither if purchased with the proceeds of products sold to agents of the government, according to the statute, the regulations and the proclamation made in pursuance thereof. The prohibition against trading with inhabitants of insurrectionary districts at localities beyond the military lines of the United States, and the transportation of property beyond those lines for the purposes of trade, continues in force to the same extent as provided under the St. of 1861.

From this review of the laws and regulations in force in March, 1865, when this contract was made, it appears that no officers of the government, civil or military, had authority to give permits to trade beyond the lines of military occupation by the forces of the United States; or to give licenses to trade to citizens of the states not in rebellion. The statute of July 2, 1864, and the regulations in pursuance thereof, were only intended to authorize purchases by the government itself from persons who resided in the insurgent states, and who owned or controlled the products of those states: which products it was thought desirable and important to obtain. No intention is there expressed, or to be implied, that the officers of the government should extend the privilege of private trading with the enemy to our own citizens. The careful provisions of the treasury regulations show that it was intended that the government alone was to be the purchaser and have control of the cotton when delivered. And the clause in the proclamation of the President, that the seller may purchase within our lines merchandise to a limited extent, which was not contraband of war, and return with safe conduct to the same place and by the same route that the Southern products were brought, shows that the privilege could be availed of by the insurgents only. *United States v. Lane*, 8 Wall. 185; *Maddox v. United States*, 15 Wall. 58. The several permits, therefore, under which the plaintiffs contend that the contract was lawfully executed, were unauthorized, and had no effect to make the contract or the enterprise to the Yazoo River lawful; nor could the contract have been executed under any permits then authorized to be issued.

The Ray permit, referred to in the contract, is therein said to be a permit issued by the President, authorizing Ray to take such goods beyond the national military lines. The permit is not in evidence, and there is no proof of its contents beyond what appears in the contract. If the permit was such as it appears to be by the language of the contract, it was clearly unlawful. The President had no authority to issue such permit by any act of Congress or regulation of the treasury, and no permit of any description could be granted to a citizen to obtain cotton beyond the federal lines.

But it is said that the cotton was in fact procured under certain permits obtained from one Topp, and referred to as the Topp permits. These are not put in evidence, and we have no means of ascertaining their purport, except that they were permits to bring out cotton. In the absence of any evidence of their contents, but taking them to be permits for this purpose, as appears by the evidence, they are open to the same objection as the Ray permit.

The Swett permit, so called, which is in evidence, was more formal, and was an attempt to comply with the form prescribed by the treasury regulations of September, 1864. Risley, a treasury agent, made an agreement with Swett to purchase 50,000 bales of cotton; and the orders for safe conduct were duly issued by the President. But Swett was a citizen of Illinois in December, 1864, when the agreement was made; and the assignment of the agreement, if valid or within the intent of the regulations, was to the defendants, who were not insurgents. Nor did Swett or the defendants own or control, at the time of the issue or assignment, any products of the states in rebellion, but contracted with Tate to procure the cotton through his connection with the cotton agent of the confederate government. A similar transaction by the same agent was held not to be justified under the statute, the regulations of the treasury or the proclamation of the President. *United States v. Lane*, *ubi supra*.

The questions involved in this discussion have been considered in repeated decisions of the supreme court of the United States. *The Reform*, 8 Wall. 617; *The Sea Lion*, 5 Wall. 680; *The Ouachita Cotton*, 6 Wall. 521; *United States v. Grossmayer*, 9 Wall. 72; *Cutner v. United States*, 17 Wall. 517; *United States v. Lapene*, 17 Wall. 601; *Sprott v. United States*, 20 Wall. 459.

The contract, therefore, and the expedition up the Yazoo River had relation to trade with the public enemy in the time of war, prohibited alike by public law and by the statutes and regulations of the United States in force at the time.

But it is contended that the contract has been executed, and this bill may be maintained under the authority of *Brooks v. Martin*, 2 Wall. 70. Without considering how far that case is in accordance with the current of authority on this question, it is clear that it bears no resemblance to the case at bar.

This is a bill founded upon the illegal contract itself, and seeks directly to enforce the provisions of that contract in regard to the distribution of the alleged profits arising out of the execution of the unlawful undertaking.

It is well settled that when a contract is illegal and prohibited by law, no action can be maintained upon it in law or equity, either to enforce its obligations or to secure its fruits to either party; and where a party cannot maintain his action without showing an illegal act on his part, he must fail in his suit. And it has been directly held that contracts for the purpose of illegal trading, or of trading in an enemy's country in time of war, cannot be the foundation of an action. In *Evans v. Richardson*, 3 Meriv. 469, a contract was entered into between an American citizen and an English subject for trading with America during time of war, and the court, of its own motion, declined to enforce it. In *Stewart v. Gibson*, 7 Cl. & Fin. 707, an American ship was fitted out in Liverpool and sent to Africa on a joint adventure for trafficking in slaves. An English ship was sent at the same time by the same parties, with arms and ammunition, to be at the disposal of the supercargo of the American ship. On arrival of the two ships, the arms and ammunition were put on board the American ship, and she was afterwards seized and condemned. It was held that the transaction was illegal, and that no action for contribution or account

could be maintained, in regard thereto, by any of the parties concerned, against the others. See Coll. Part. (5th Am. ed.) § 56 *q seq.*; 1 Lindl. Part. (3d ed.) 187, 209; *Griswold v. Waddington*, 16 Johns. 38; *Coppell v. Hall*, 7 Wall. 542; *Jecker v. Montgomery*, 18 How. 110, and cases there cited in regard to trading with the money. The same principle applies where goods are smuggled. *Biggs v. Lawrence*, 3 T. R. 454.

In *Armstrong v. Toler*, 11 Wheat. 258, 271, it was said by Chief Justice Marshall: "Questions upon illegal contracts have arisen very often both in England and in this country; and no principle is better settled than that no action can be maintained on a contract, the consideration of which is either wicked in itself or prohibited by law. How far this principle is to affect subsequent or collateral contracts, the direct and immediate consideration of which is not immoral or illegal, is a question of considerable intricacy, on which many controversies have arisen, and many decisions have been made." In that case, Armstrong, in time of war, contrived a plan for importing goods on his own account from the enemy. The goods were consigned to Toler, and Armstrong promised to pay him any sum for which he might become liable if the goods should be condemned. On this promise it was held that Toler could maintain an action. And it was said in the opinion: "It cannot be questioned, that however strongly the laws may denounce the crime of importing goods from the enemy in time of war, the act of defending a prosecution instituted in consequence of such illegal importation is perfectly lawful. Money advanced by a friend in such a case is advanced for a lawful purpose, and a promise to repay it is made on a lawful consideration. The criminal importation constitutes no part of this consideration." But if the importation was the result of a scheme between the parties, or if Toler had an interest in the goods, or if they were consigned to him with his privity, that he might protect or defend them for the owner, then the promise to pay would be void. "The point of law decided is, that a subsequent independent contract, founded on a new consideration, is not contaminated by the illegal importation, although such illegal consideration was known to Toler when the contract was made, provided he was not interested in the goods, and had no previous concern in their importation." See *Tenant v. Elliott*, 1 B. & P. 3; *Farmer v. Russell*, 1 B. & P. 269; *Thomson v. Thomson*, 7 Ves. 470; *McBlair v. Gibbes*, 17 How. 232; *Kinsman v. Parkhurst*, 18 How. 289. *Dyer v. Homer*, 22 Pick. 253, and *Harvey v. Varney*, 98 Mass. 118, have some bearing on this question.

The cases of *Tenant v. Elliott* and *Thomson v. Thomson* illustrate the rule laid down in *Armstrong v. Toler*: in the first, it was held that the action could be maintained; in the second, that it could not. In *Tenant v. Elliott*, the defendant, a broker, effected insurance for the plaintiff, which was in violation of the navigation laws, and illegal. A loss happened, and the underwriters paid the money to the broker, and, on action brought, he set up the illegality as a defence. But the plaintiff recovered on the implied promise, arising out of the receipt of the money for the plaintiff, as a new contract not affected by the illegality of the original transaction. In *Thomson v. Thomson*, there was a sale of the command of an East India ship to the defendant upon the consideration

that he should pay to the plaintiff £200 annually while he remained in command. The contract was illegal, but an allowance having been made to the defendant on retiring, the bill was filed to have a portion of the allowance invested to satisfy the annuity. But it was refused, on the ground that there was no claim to the money, except through the illegal agreement; the money was paid to the party; if it had been paid, the court say, to a third person (as in *Tenant v. Elliott*), the plaintiff might have recovered, for the third person could not have set up this objection to performing the trust. The Master of the Rolls, Sir William Grant, said: "There is nothing collateral in respect of which, the agreement being out of the question, a collateral demand arises."

Applying, therefore, the rule of *Armstrong v. Toler* to this class of cases, it is clear that in the case at bar there is a fatal disability in the plaintiffs, which prevents them from asking the aid of a court of equity to enforce the contract upon which this bill is founded. The cases of *Brooks v. Martin*, 2 Wall. 70, and *Sharp v. Taylor*, 2 Phil. Ch. 801, upon which case *Brooks v. Martin* rests as its principal authority, relate to subsequent or collateral contracts and transactions, in which the original illegal acts and contracts are held to form no part of the consideration. In *Sharp v. Taylor*, the doctrine of *Tenant v. Elliott* was carried somewhat farther, and held to apply to a partner, who, having by collusion with an agent of the partnership possessed himself of the property of the firm, was not allowed to show that, in realizing it, the provisions of an act of parliament had been violated. The distinction between enforcing illegal contracts, and asserting title to property that has arisen therefrom, was fully considered by the court, and the case was held to fall within the rule laid down in *Tenant v. Elliott*, *Farmer v. Russell*, and recognized in *Thomson v. Thomson*. The decision distinctly states that the bill does not seek to enforce an agreement adverse to an act of parliament, or to recover compensation or payment for an illegal voyage, and that those questions were settled by the payment of the money over by the agent to the defendant, who held as tenant in common with the plaintiff, and who cannot dispute a title that is common to both. Taking into view the fact that the defendant was the partner of the plaintiff in the original enterprise from which the money accrued, and the difficulty of reaching him except through the illegal partnership transactions, the soundness of the decision may be open to question; but, assuming that the distinction upon the facts made by the court is correct, it is sustained by the authorities.

Mainly on the authority of that case, *Brooks v. Martin*, 2 Wall. 70, was decided, and Mr. Justice Miller, in delivering the opinion of the court, says: "That the principle is the same in both cases, and that the analogy in the facts is so close, that any rule on the subject which should govern the one ought also to control the other." The parties entered into a partnership, the object being the "purchase and sale of bounty land warrants, that may have been or may be issued under the law of Congress." The law provided that warrants for land should be issued to soldiers engaged in the Mexican War; and, to protect the soldier, it declared that any sale or contract made prior to the issue of such warrants should be null and void. U. S. St. 1847, c. 8, § 9; 9 U. S. Sts. at Large, 125. The money

was to be furnished by Martin; the business was to be conducted by Brooks. Martin advanced the money, and it was invested by Brooks in the purchase of warrants which were sold or located; and there came into the hands of Brooks land, money, notes, and mortgages, the result of the partnership business, the original capital of which Martin had advanced. In this state of facts, Martin sold his interest to Brooks for a small and utterly inadequate consideration, being induced to do so by the fraud, concealment, and misrepresentation of Brooks, as to the value of the property in his hands; and the bill was brought to set aside that sale on the ground of fraud. It was not to enforce the original contract, which was unlawful, but to set aside a subsequent agreement entered into between the parties, whereby one partner fraudulently obtained possession of the whole property. And it was decided that Brooks could not set up the original illegality, arising out of the purposes for which the partnership was first formed, as a defence; that Brooks was not only the partner of the plaintiff, but, owing to the manner in which the business was conducted, he was his special agent in its management; that the purchase made by him of Martin's interest must be governed by the rules which govern such transactions as between principal and agent; and that the law governing such fiduciary relations must apply, and the contract of sale be set aside. The case may be open to the same criticism, as to the application of the rule, as has been suggested in regard to *Sharp v. Taylor, ubi supra*; but as it is so clearly to be distinguished from the case at bar, it is not necessary to consider that question. And it may be, as the soldier alone could take advantage of the illegality, and avoid the sale by himself of a land warrant before it was issued, the titles under such warrants being good, that the case would fall within the principle laid down in *Harvey v. Varney*, 98 Mass. 118. It was there held that a contract, executed or executory, for the conveyance of real or personal property to conceal it from attachment, while voidable by creditors, was good between the parties, though both shared in the fraudulent intent; and the fraudulent character of the purpose of a partnership as to creditors was no defence to a bill in equity by one of its members against the others for a settlement of the affairs of the firm. In that case the court remarked that "*Brooks v. Martin* adopts principles far more extensive than those we have found it necessary to affirm for the decision of the present cause." See *Dyer v. Homer*, 22 Pick. 253.

The bill seeks to enforce directly an illegal contract, and to secure its fruits to the plaintiffs, and cannot be maintained. It is therefore unnecessary to consider the other questions raised upon the report and argued at the bar.

*Bill dismissed.*





# INDEX.

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## ADMIRALTY.

1. The captain of a vessel, as such, has no authority to pledge the credit of the owner for necessary repairs made at the home port, where the owner resides and can be consulted, and can personally interfere. *Pentz v. Clarke*, 4.
2. And the fact that the captain is also a part owner of the vessel, gives him no authority to pledge the credit of his co-owner for such repairs. In order to bind the owner of a vessel for necessary repairs done at the home port, where he resides and can personally interfere, the master must have special authority for that purpose; or the owner must have held out the master as having such authority; or he must have ratified the contract after it was made. *Ib.*
3. Where a ship is necessarily delayed for repairs, the repairs having been rendered necessary by a peril of the sea and being required to enable the ship to proceed upon her voyage, although they are made in a port on the route of her regular voyage, the wages and provisions of her crew during the period of detention may be allowed as general average. And the sum paid for services and expenses of a special agent sent to assist the ship in the port of distress may, also, be allowed. *Hobson v. Lord*, 257.

## ASSESSMENT.

An assessment that could not have been directly levied by the legislature of a state, cannot be legalized by an enactment of such legislature. *People v. Lynch*, 127.

## ATTACHMENT.

See **BANKRUPTCY**, 5, 6, 7, 9, 10.

## ATTORNEY.

1. An attorney at law is an officer of the court, and may be removed from office for misconduct, ascertained and determined by the court after an opportunity to be heard has been afforded. *Sanborn v. Kimball*, 13.
2. The statute makes "a good moral character" a prerequisite of admission to the bar; and when an attorney at law has forfeited his claim to such character by such misconduct, professional or non-professional, in or out of court, as renders him unworthy to associate with gentlemen, and unfit and unsafe to be intrusted with the powers, duties, and responsibilities of the legal profession, the court may deprive him of the power and opportunity to do further injury under the color of his profession by removing him from the bar. *Ib.*
3. The evidence in this case conclusively establishes the allegation in the motion that "the respondent does not possess a good moral character," in that it shows that he has committed a fraud upon the court, violated his professional oath and duty, conducted dishonestly in his private dealings, and disregarded the proprieties and civilities due to other members of the profession. *Ib.*
4. By admitting the respondent to the bar the court held him out to the public as worthy of confidence and patronage in the line of his profession. In view of the power of removal vested in the court, to allow the respondent to continue to exercise his profession after he has been thus proved to be unworthy of his office, would be indirectly to involve the court in the responsibility of his acts. And further, after the disclosures in this case, the court cannot forbear to pronounce the judgment of removal from office against the respondent without abdicating the high trust which the law confides to it in this behalf, and rendering that a nullity. *Ib.*
5. The respondent has been pardoned for the forgery of which he was convicted and for

which he was confined in the state prison; but the instrument forged was a deposition used in a cause before this court; and though the pardon purged him of the offence of which he was convicted, it did not affect the crime of the violation of his professional oath and duty, nor relieve him from the penalty of removal from the bar for this misconduct. *Ib.*

See JUDGMENT, WILL.

#### ATTORNEY AND CLIENT.

1. Where the parties to a fraudulent or illegal transaction are *in pari delicto*, the simple fact, that at the time of such transaction, the relation of client and attorney exists between them, will give the former no claim to the aid of a court of equity to have restored to him the property of which the latter has become possessed by their joint fraud. Such relation alone will not except the case from the general rule, *in pari delicto potior est conditio defendentis*. *Roman v. Mali*, 313.
2. An attorney is under no actual incapacity to deal with or purchase from his client. All that can be required is, that there has been no abuse of the confidence reposed; no imposition or undue influence practised, nor any unconscionable advantage taken by the attorney of the client. When a transaction between parties occupying such relation to each other is brought in question, the onus of the case is cast upon the attorney of showing that nothing has happened in the course of the dealing which might not have happened had no such connection subsisted, and that the transaction has been fair in all respects. If the court be satisfied that the party holding the relation of client performed the act or entered into the transaction voluntarily, deliberately, and advisedly, knowing its nature and effect, and that no concealment or undue means were used to obtain his consent to what was done, the transaction will be maintained. *Ib.*

#### BAILOR AND BAILEE.

1. Where a bailment is for the sole benefit of the bailor, the bailee is answerable only for gross neglect; when solely for the benefit of the bailee, he is responsible for slight neglect; when reciprocally beneficial to both, the bailee is responsible for ordinary neglect. *First National Bank of Carlisle v. Graham*, 501.
2. A bailee keeping the property of the bailor with the ordinary care with which he keeps his own, does not fulfil his duty if the contract requires strict diligence and extraordinary care. *Ib.*
3. Where the benefits are reciprocal, the bailee is liable for neglect of ordinary care, although he has been careless and reckless in the management of his own goods as well as those of the bailor. *Ib.*
4. That the bailee has dealt with his own goods and the bailor's in the same way is evidence in adjusting the standard of duty and deciding the question of performance, and as a test of the bailee's good faith. It would raise a presumption of adequate diligence. *Ib.*
5. The measure of the bailee's responsibility is to be determined in each case by a comparison with the conduct of classes of men, not of individuals. *Ib.*
6. The mere voluntary act of the cashier of a bank in receiving securities for safe keeping will not render the bank liable for their loss; but if the deposit be known to the directors and acquiesced in, the bank will be liable. *Ib.*

#### BANKS AND BANKING.

See BAILOR AND BAILEE, 6; BILLS AND NOTES, 3.

#### BANKRUPTCY.

1. The amendatory Bankruptcy Act of March 3, 1873, is not unconstitutional. *In re Smith*, 335.
2. The amendatory Bankruptcy Act of June 22, 1874, is to be regarded as amending and supplementing the Revised Statutes, notwithstanding the date of its passage and its reference to the Act of 1867. *In re Oregon, &c. Co.* 469.
3. The same proportion of creditors must, under existing laws, join in a petition in involuntary bankruptcy against a corporation as is required in case of a natural person. *Ib.*
4. The petition against a corporation must show that the corporation is a "moneyed, business, or commercial corporation." *Ib.*
5. The failure of the defendant to appear and defend an attachment against his prop-

- erty is no evidence of his having done any act to *procure* the attachment within the meaning of section 35 of the Bankrupt Act of 1867, or to *procure* or *suffer* his property to be taken under legal process within the meaning of section 39 of said act. *Henkelman v. Smith*, 283.
6. Section 14 of the bankrupt act refers and can only refer to attachments which are *pending* at the time the petition in bankruptcy is filed, and not to such as have been prosecuted to a judgment prior to the filing of such petition. *Ib.*
  7. The attachment having been properly issued and prosecuted to judgment, that judgment is final, imports absolute verity, is conclusive with respect to the subject matter adjudicated, and cannot be reexamined or impeached in a collateral proceeding. *Ib.*
  8. Action was brought in a state court upon certain promissory notes. The defence was that defendant had been duly declared a bankrupt, that plaintiff had proved the claim sued on, and been paid a dividend thereon, and that the payment of such dividend had the effect to absolutely discharge the defendant from the whole of the claim sued on. *Held*, that the action was well founded, and could be maintained for the balance due in excess of the dividend. *New Lamp Chimney Co. v. Ansonia Co.* 110.
  9. An attachment of the property of a debtor is *ipso facto* dissolved if proceedings in bankruptcy are commenced within four months thereafter, upon which the debtor is adjudicated a bankrupt. Rev. Sts. § 5044; § 14 of original Bankrupt Act. *Brackem v. Johnston*, 537.
  10. A creditor who proceeds in a state court by a writ of attachment on which he seizes the property of his debtor and realizes his judgment obtained in such a suit by a sale of the property attached, is liable to the assignee in bankruptcy of the debtor appointed under proceedings commenced in the bankruptcy court within four months of the levy of the attachment, although the assignee did not appear or defend the attachment suit, or make any attempt to arrest the attachment proceedings. The case distinguished from *Wilson v. City Bank*, 17 Wall. 473, and *Eyster v. Goff*, 91 U. S. Rep. (1 Otto) 521. *Ib.*

See CONTRACT, 1.

#### BILLS AND NOTES.

1. The defendant made and indorsed in blank a note, on six months, payable to his own order, which within a week was cashed by the bank of which the plaintiff was president, under his direction without further indorsement. Hearing afterward that the maker alleged fraud in the origin of the paper, and deeming himself negligent in not requiring a second indorser, the plaintiff took the note (long after its maturity) paying his bank the amount of it: *Held*, that he was a *bonâ fide* holder for value and entitled to recover without regard to any fraud in the inception of the paper, or any failure of consideration between the original parties. *Roberts v. Lane*, 189.
2. The person who puts in suit a note shown to have been obtained from the maker by fraud, assumes the burden of establishing his own good faith. This he may do by showing that he, or any prior holder to whose rights he succeeds, has taken the note fairly for value before maturity in the due course of business, and without knowledge of the fraud, or notice of any circumstances of suspicion connected with the paper. It is immaterial what the plaintiff's knowledge may be, if any prior owner whose rights he has was a *bonâ fide* holder of the note as above explained. It does not affect the principles of law above stated, that the note was made to the maker's order and bore only his indorsement, so that it passed by delivery, and the title was apparently derived directly from him, if it is shown that in fact it was purchased by the plaintiff's predecessor in title, in good faith, and for value, of him to whom the maker first gave it. *Ib.*
3. It is no defence to a note made and indorsed only by one and the same person, that the plaintiff bought it of a bank which is prohibited by the R. S. c. 47, § 14, from discounting paper without having at least two names to it. This provision is for the security of the stockholders, and does not concern him who obtains the loan upon it. *Ib.*
4. A note in the ordinary form, payable to order at a definite time, for a specified sum in money, is negotiable, notwithstanding the addition of the words, "said promise made for a colt, this day taken; said colt holden for the payment of said amount." *Collins v. Bradbury*, 67.
5. A nonsuit will not be ordered for a slight verbal variance between the note in suit and the declaration, when "the person and case can be rightly understood," and it is apparent that the declaration was intended to and does embrace the note in suit. *Ib.*

6. The defendant was induced to sign his name, as maker, to a negotiable promissory note, by the false and fraudulent representations that it was a contract of an entirely different character, whereby he would incur no pecuniary liability; but it appeared further, that it was a negligent act on his part to sign the note without ascertaining whether it was what the payee represented, or something else. *Held*, that the defendant was precluded by his negligence from setting up the fraud against a *bonâ fide* holder of the note who had purchased it for value before due. *Citizens' National Bank v. Smith*, 248; *Kellogg v. Curtis*, 419.

See GUARANTY.

## CONFEDERATE STATES.

See CONSTITUTIONAL LAW, 1.

## CONSTITUTIONAL LAW.

1. A statute of North Carolina of March, 1866, enacting that in all civil actions "for debts contracted during the late war, in which the nature of the obligation is not set forth, nor the value of the property for which such debts were created is stated, it shall be admissible for either party to show on the trial, by affidavit or otherwise, what was the consideration of the contract; and that the jury in making up their verdict shall take the same into consideration, and determine the value of said contract in present currency, in the particular locality in which it is to be performed, and render their verdict accordingly," in so far as the same authorizes the jury in such actions upon the evidence thus before them to place their own estimate upon the value of the contracts, instead of taking the value stipulated by the parties, impairs the obligation of such contracts, and is, therefore, within the inhibition upon the state of the federal Constitution. Accordingly, in an action upon a contract for wood sold in that state during the war, at a price payable in Confederate currency, an instruction of the court to the jury that the plaintiff was entitled to recover the value of the wood without reference to the value of the currency stipulated was erroneous. *W. & W. R. R. Co. v. King*, 1.
2. An act which has the effect of rendering valid formal judgments, entered by a court without jurisdiction, is to be regarded as an exercise of judicial functions by the legislature, and as a contravention of the provision that no person shall be deprived of property without due process of law, and is, therefore, void. *Pryor v. Downey*, 68.
3. The Act of May 31, 1870 (16 Stats. at Large, 140), known as the "Enforcement Act," is so general in its provisions that it cannot be regarded as "appropriate legislation" for the effectuation of the purposes of the fifteenth amendment to the Constitution of the United States. It is to all intents and purposes inoperative. *United States v. Reese*, 201.
4. The "Enforcement Act."—Construction of section six.—Of the insufficiency of indictments thereunder which do not charge a conspiracy to hinder or prevent the enjoyment of a right granted or secured by the Constitution of the United States.—Of the nature of state and United States citizenship, and the nature and powers of the state and general governments. *United States v. Cruikshank*, 206.
5. The provision of the section 23, art. 4, of the Constitution of Nevada, that the enacting clause of every law shall be as follows: "The People of the State of Nevada represented in Senate and Assembly do enact as follows," is mandatory. The omission of the words "Senate and" from the enacting clause of an act of the legislature, renders the act unconstitutional and void. *State of Nevada v. Rogers*, 339.
6. The fourteenth amendment of the federal Constitution provides that no state shall deprive any person of liberty without due process of law. *Held*, that the *ex parte* determination of two overseers of the poor is not such process. *City of Portland v. City of Bangor*, 435.
7. The city of Portland sued the city of Bangor for supplies furnished the alleged pauper, in the workhouse of the plaintiff city, committed under a warrant of two overseers of the poor. *Held*, that the commitment was illegal, that the plaintiffs could not recover, and that the decisions in *Nott's case*, 11 Maine, 208, and in *Portland v. Bangor*, 42 Maine, 403, holding to the contrary, are inconsistent with the fourteenth amendment of the federal Constitution. *Ib.*
8. The omission to provide for notice to parties in interest does not render a statute invalid. *State v. Doyle*, 450.
9. The case of the *City of New York v. Miln*, 11 Peters, 103, decided no more than

- that the requirement from the master of a vessel of a catalogue of his passengers landed in the city, rendered to the mayor on oath, with a correct description of their names, ages, occupations, places of birth, and of last legal settlement, was a police regulation within the power of the state to enact, and not inconsistent with the Constitution of the United States. *Henderson v. Wickham, Mayor*, 227.
10. The result of the *Passenger Cases*, 7 How. 283, was to hold that a tax demanded of the master or owner of the vessel for every such passenger was a regulation of commerce by the state, in conflict with the Constitution and laws of the United States, and, therefore, void. *Ib.*
  11. These cases criticised, and the weight due to them as authority considered. *Ib.*
  12. In whatever language a statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect. *Ib.*
  13. Hence, a statute which imposes a burdensome and almost impossible condition on the ship-master as a prerequisite to his landing his passengers with an alternative payment of a small sum of money for each one of them is, in fact, a tax on the ship-owner for the right to land such passengers, and in effect, on the passenger himself, since the ship-master makes him pay it in advance as part of his fare. *Ib.*
  14. Such a statute of a state is a regulation of commerce, and when applied to passengers from foreign countries is a regulation of commerce with foreign nations. *Ib.*
  15. It is no answer to the charge that such regulation of commerce by a state is forbidden by the Constitution to say that it falls within the police power of the states, for to whatever class of legislative powers it may belong, it is prohibited to the states if granted exclusively to Congress by that instrument. *Ib.*
  16. Though it may be conceded that there is a class of legislation which may affect commerce, both with foreign nations and between the states, in regard to which the laws of the states may be valid in the absence of action under the authority of Congress on the same subjects, this can have no reference to matters which are, in their nature, national, or which admit of a uniform system or plan of regulation. *Ib.*
  17. The statutes of New York and Louisiana, here under consideration, are intended to regulate commercial matters which are not only of national but of international concern, and which are also best regulated by one uniform rule, applicable alike to all the seaports of the United States. These statutes are, therefore, void, because legislation on the subjects which they cover is confided exclusively to Congress by the clause of the Constitution which gives to that body the "right to regulate commerce with foreign nations." *Ib.*
  18. The constitutional objection to this tax on the passenger is not removed because the penalty for failure to pay does not accrue until twenty-four hours after he is landed. The penalty is incurred by the act of landing him without payment, and is, in fact, for the act of bringing him into the state. *Ib.*
  19. This court does not, in this case, undertake to decide whether or not a state may, in the absence of all legislation by Congress on the same subject, pass a statute strictly limited to defending itself against paupers, convicted criminals, and others of that class, but is of opinion that to Congress rightfully and appropriately belongs the power of legislating on the whole subject. *Ib.*
  20. The statute of California which is the subject of consideration in this case does not require a bond for every passenger, or commutation in money, as the statutes of New York and Louisiana do, but only for certain enumerated classes, among which are "lewd and debauched women." But the features of the statute are such as to show very clearly that the purpose is to extort money from a large class of passengers, or to prevent their immigration to California altogether. *Chy Lung v. Freeman*, 407.
  21. The statute also operates directly on the passenger, for, unless the master or owner of the vessel gives an onerous bond for the future protection of the state against the support of the passenger, or pays such sum as the commissioner of immigration chooses to exact, he is not permitted to land from the vessel. *Ib.*
  22. The powers which the commissioner is authorized to exercise under this statute are such as to bring the United States into conflict with foreign nations, and which can only belong to the federal government. *Ib.*
  23. If the right of the states to pass statutes to protect themselves in regard to the criminal, the pauper, and the diseased foreigner landing within their borders exists at all, it is limited to such laws as are absolutely necessary for that purpose; and this mere police regulation cannot extend so far as to prevent or obstruct other classes of persons from the right to hold personal and commercial intercourse with the people of the United States. *Ib.*
  24. The statute of California in this respect extends far beyond the necessity in which

- the right is founded, if it exists at all, and invades the right of Congress to regulate commerce with foreign nations, and is, therefore, void. *Ib.*
25. A license tax required for the sale of goods is in effect a tax upon the goods themselves. A statute of Missouri which requires the payment of a license tax from persons who deal in the sale of goods, wares, and merchandise which are not the growth, produce, or manufacture of the state, by going from place to place to sell the same in the state, and requires no such license tax from persons selling in a similar way goods which are the growth, produce, or manufacture of the state, is in conflict with the power vested in Congress to regulate commerce with foreign nations and among the several states. *Welton v. State of Missouri*, 100.
26. That power was vested in Congress to insure uniformity of commercial regulation against discriminating state legislation. It covers property which is transported as an article of commerce from foreign countries, or among the states, from hostile or interfering state legislation until it has mingled with and become a part of the general property of the country, and protects it even after it has entered a state from any burdens imposed by reason of its foreign origin. *Ib.*
27. The inaction of Congress in prescribing rules to govern inter-state commerce is equivalent to its declaration that such commerce shall be free from any restrictions. *Ib.*

See ASSESSMENT ; BANKRUPTCY, 1.

### CONTRACT.

1. The withdrawal of opposition to bankruptcy proceedings already begun, is a valid consideration for an agreement made by the petitioning creditors with the defendants in bankruptcy. *Sanford v. Huxford*, 23.
2. Though the language used and the effect of it are questions of fact for the jury, in controversies relating to a contract by parol, yet it is also true that in many cases the law will infer a definite, though perhaps implied contract, from certain admitted facts. At least it will infer certain elements as belonging to particular contracts, or impose specific duties in connection with, and growing out of special undertakings, although these are entered into by parol. *Ballou v. Prescott*, 53.
3. Especially is this true of contracts growing out of an employment quasi public in its nature, like that of a professional man. *Ib.*
4. Thus, the care and skill which a professional man guarantees to his employer are elements of the contract into which he enters by accepting a proffered engagement. So continued attention to the undertaking, so long as attention is required, in the absence of any stipulation to the contrary, is equally an inference of the law. *Ib.*
5. While it is competent for a physician and his patient to enter into such a contract as they think fit, limiting the attendance to a longer or shorter period, or to a single visit, if they please; and while, if there be no such limitation, the physician can discontinue his attendance at his election, after giving reasonable notice of his intention to do so; yet, if he be sent for at the time of an injury by one whose family physician he has been for years, the effect of his responding to the call will be an engagement to attend to the case, so long as it requires attention, unless he gives notice to the contrary, or is discharged by the patient; and he is bound to use ordinary care and skill, not only in his attendance, but in determining when it may be safely and properly discontinued. *Ib.*
6. If a surgeon, called to attend one who has long been his employer, leaves his patient before he has been properly cared for professionally, or while he needs further attention, and relies upon an alleged discharge by the patient as a defence to a suit brought for the abandonment, this being a new substantive matter of defence, the burden of proving it is upon the defendant. *Ib.*
7. A parol contract for the sale of real estate, however specific, cannot be enforced. A parol contract was made whereby B agreed to sell A certain real estate at a certain price, a part of which was paid at the time of the agreement, and executed a deed which was placed in the custody of B's attorney to be surrendered to A upon the execution and delivery, upon a day certain, of notes and a mortgage to secure their payment. A duly executed the notes and mortgage, delivered them to B's attorney, and demanded the deed, which was refused. *Held*: that, under the statute of frauds, the contract to deliver the deed could not be enforced; that the deed was not an escrow, and that B was not estopped to deny the validity of the contract. *Thomas v. Sowards*, 25 Wisc. 631, modified; *Campbell v. Thomas*, 49.

8. Contracts made during the war in one of the Confederate States, payable in Confederate currency, but not designed in their origin to aid the insurrectionary government, are not, because thus payable, invalid between the parties. In actions upon such contracts evidence as to the value of that currency at the time and in the locality where the contracts were made is admissible. *Wilmington & Weldon R. R. Co. v. King*, 1.
9. The provisions of the U. S. St. of 1864, c. 225, §§ 8, 9, and of the treasury regulations of July 29, and September 24, 1864, respecting purchases of the products of the then insurgent states, and commercial intercourse with their inhabitants, did not authorize any such intercourse, excepting by the agents of the United States appointed to make such purchases. Nor did they authorize such agents to contract for such products with citizens of the states not in rebellion, nor for such products not, at the time of the contract, actually owned or controlled by the vendor. Under the U. S. St. of 1864, c. 225, §§ 8, 9, and the treasury regulations of July 29 and September 24, 1864, no officer of the United States government, civil or military, had authority to grant permission to any person to take goods beyond the lines of the military occupation of the United States, for trade or exchange for the products of the insurgent states. *Snell v. Dwight*, 560.
10. A bill in equity cannot be sustained by one of the parties to a contract for illegal trading with inhabitants of states declared in insurrection against the United States government, against another party to such contract, for an account of resulting profits. *Ib.*

See GUARANTY.

#### CORPORATION.

See BANKRUPTCY, 8, 4; DAMAGES, 1; MECHANIC'S LIEN, 6; TAXATION.

#### CRIMINAL LAW.

1. On the trial of an indictment for murder, the prisoner may, for the purpose of showing that the homicide was justifiable on the ground of self-defence, prove that the deceased was a person of violent, vicious, and dangerous character, and that that character was known to the prisoner at the time of the rencontre between them. *Marts v. The State*, 414.
2. Homicide is justifiable on the ground of self-defence, where the slayer, in the careful and proper use of his faculties, *bonâ fide* believes, and has reasonable ground to believe, that he is in imminent danger of death or great bodily harm, and that his only means of escape from such danger will be by taking the life of his assailant, although, in fact, he is mistaken as to the existence or imminence of the danger. *Ib.*
3. Where the plaintiff examines a witness in chief, who merely testifies to matters which are not controverted by the defendant or his witnesses, and after the close of defendant's testimony the same witness, upon being recalled by the plaintiff as a rebutting witness, contradicts the testimony of the defendant and his witnesses, the defendant has a right then to prove the bad reputation of the witness for truth and veracity. *Ib.*
4. On the trial of an indictment for murder it is competent for the jury, where the evidence justifies it, to find the defendant guilty of an assault and battery only, and it is error to the prejudice of the defendant to instruct the jury otherwise. *Ib.*

See INTOXICATING LIQUORS.

#### DAMAGES.

1. In an action against a corporation for the wilful acts of its servant, done in the course of his employment and in the discharge of his duty, the corporation is liable for actual damages only. For all exemplary damages the servant alone is liable, unless he is authorized by the officers of the corporation to commit the wrongful act or his act is ratified or approved by them. Actual and exemplary damages distinguished. *McKinley v. Chicago & Northwestern Railway Co.* 279.
2. In awarding damages to the owner of land taken for a railroad, the exposure of his remaining land and buildings to fire from the company's engines is a proper element to be considered in making the estimate. *Adden v. White Mts. N. H. Railroad*, 78.
3. The statute which imposes upon railroad corporations an absolute liability for all damage caused by fires from their locomotives, does not necessarily preclude a recovery of anything for this cause; but the question is, How much will the property be diminished in value by reason of such exposure, considering at the same time the indemnity provided by the statute? *Ib.*

4. Benefits from the construction of a railroad, which the land-owner enjoys in common with the public generally, cannot be set off in reduction of his damages. *Ib.*

## DEED.

1. On the 29th of November, 1866, T., being seised in fee of a tract of land in F. County, executed a deed in which his wife joined to bar her dower, conveying the tract, in consideration of love and affection, to certain children of his deceased illegitimate son, to whom his wife bore no blood relation. The deed purported to have been executed and acknowledged in F. County, before a justice of the peace for that county, but was in fact executed and acknowledged in C. County, where T. and his wife lived, before a justice for F. County. Such an acknowledgment was invalid by the laws of Maryland; but the Act of 1867, ch. 160, provided that all deeds so executed and acknowledged since November 1, 1864, should be as valid to all intents and purposes as if properly acknowledged. In December, 1866, before the passage of this act, T. died intestate, and soon after his widow filed a bill to have the deed declared a nullity and for assignment of dower. *Held*: (1.) That as against T. and his heirs, the deed, being a good grant at common law, and executed upon a strong moral consideration, was cured by the statute; (2.) That the deed, being without acknowledgment, was utterly null and void as against the wife both at law and equity; that the statute could not impart life to it, as against her, without interfering with her vested rights secured by the Declaration of Rights; and that therefore she was entitled to have dower assigned her in the land conveyed. *Grove v. Todd*, 59.
2. Retroactive legislation, to cure or confirm conveyances or other proceedings defectively acknowledged or executed, is sustainable upon the ground that it operates not upon the deed or contract, by changing it, but upon the mode of proof only. *Ib.*
3. A wife can only be divested of her dower by proper and legal acknowledgment, and a deed not so acknowledged is wholly inoperative as to her, and is to be treated as if she had not been a party to it. *Ib.*
4. A married man by a deed voluntary and without valuable consideration, conveyed nearly the whole of his property to his nephew. To the conveyancer who prepared the deed, he stated that his purpose was to deprive his wife of the property. The deed was executed on the 20th of May, 1872, and recorded the same day in Baltimore. The grantee lived in New Hampshire, and never had possession of the deed till after the death of the grantor in July, 1873. Before the deed was executed, a power of attorney was sent to the grantee and executed by him in New Hampshire, by which the grantor was authorized "to sell and convey, mortgage, or otherwise dispose of the property." In August, 1872, the grantor wishing to borrow \$1,000 for his own use, one of the pieces of property mentioned in the deed was mortgaged to secure it. The mortgage and notes were sent to the grantee and by him were executed. The grantor remained in possession of the property embraced in the deed, until his death. On a bill filed by the widow against the grantee, to have the deed declared void as in fraud of her rights, it was *Held*, that the deed was not made *bonâ fide*; but as to the complainant was fraudulent, and could not operate to deprive her of her legal rights as widow and distributee. *Sanborn v. Lang*, 84.

## DOWER.

See DEED, 1, 2, 3.

## ENFORCEMENT ACT.

See CONSTITUTIONAL LAW, 3, 4.

## EQUITY.

1. He who comes into equity must come with clean hands; and if a party seek to cancel or set aside an instrument, or be relieved of a transaction, or recover property on the ground of fraud, and he himself has been guilty of a wilful participation in the fraud, equity will not interpose in his behalf. *Roman v. Mali*, 313.
2. A bill was filed against a devisee to compel her to convey to the complainant certain real property, the legal title to which was held by her testator at the time of his death. The bill alleged in substance, that the testator acquired the title to the property in the capacity of agent and legal adviser of the complainant, and that he paid for it with the money of the complainant, and held it as his agent and trustee from the time of the purchase until his death. The evidence in the case, in the opinion of



a majority of the court, showed that in the transfer and concealment of the property of the complainant in the name and apparent ownership of the testator, a gross fraud was perpetrated upon the creditors of the former; that the whole transaction was the joint scheme of the two — the one coöperating with the other and both being equally guilty — to withdraw and conceal the complainant's property from the pursuit of his creditors; that the object was accomplished, and the complainant got rid of his creditors by a composition founded upon his fraud and deception. *Held*, that the complainant could not obtain the aid of a court of equity to have the property restored to him. *Ib.*

3. There may be different degrees of guilt as between the parties to a fraudulent or illegal transaction; and if one party act under circumstances of oppression, imposition, undue influence, or at great disadvantage with the other party concerned, so that it appears that his guilt is subordinate to that of the defendant, the court, in such case, will relieve. *Ib.*

See DEED, 4.

#### EVIDENCE.

1. Collateral facts incapable of affording reasonable presumption as to the principal matter in dispute, are inadmissible as evidence, as tending to draw the minds of the jury from the issue and to prejudice and mislead them. *First Nat'l Bank of Carlisle v. Graham*, 501.
2. Where certain buildings had been erected, by permission of a railroad company, within the lines of its roadway, it was held that evidence showing the permissive erection and occupation was competent and material. *Grand Trunk Railway Co. v. Richardson*, 166.
3. Evidence to show a usual custom or practice of railroad companies, held to be incompetent to explain away a specific act of negligence. *Ib.*
4. Plaintiffs were permitted to show that at various times shortly prior to the occurrence of a fire, which caused the loss for which the action was brought, defendant's locomotives scattered fire while passing the property destroyed, no proof being offered that such locomotives had caused, or were similar to those which caused the fire. *Held*, that the evidence was properly allowed to go to the jury. *Ib.*
5. Non-professional witnesses, who are not subscribing witnesses to a will, may testify to their opinions in regard to the sanity of the testator, when founded upon their knowledge and observation of the testator's appearance and conduct. *Boardman v. Woodman*, 47 N. H. 120; *State v. Pike*, 49 N. H. 399; and *State v. Archer*, 54 N. H. 468, upon this point overruled. *Hardy v. Merrill*, 374.
6. The party who affirms that a will was duly and legally executed, has the burden of proof and the accompanying duty of opening, and the right to close, no matter in what form the issues for trial may be drawn. *Ib.*
7. Under the amendatory act of April 18, 1870 (67 Ohio L. 113), husband and wife are competent witnesses for and against each other, except as to communications made by one to the other, and acts done by one in the presence of the other during coverture, and not in the known presence of a third person. *Westerman v. Westerman*, 142.
8. And the act is applicable to cases pending and causes of action existing at the time of its passage, notwithstanding the provisions of the Act of February 19, 1866 (S. & S. 1), declaring the effect of appeals and amendments. *Ib.*
9. Evidence that a third person was present, and known to be present, at the time of making such communications, or doing such acts, is for the court and not for the jury, and, on error, will be presumed to have been given to the court, unless the contrary appears. *Ib.*
10. Where a motion is made to exclude the entire testimony of a witness, part only of which testimony is incompetent, without specifying any particular part of the testimony objected to, or disclosing the ground of objection, it is not error in the court to overrule the motion. *Ib.*
11. Photographic copies of manuscript are only secondary evidence like any copies, and it is not error to exclude them from the consideration of the jury, where the original is at hand. *In re Foster*, 411.
12. On a bill by a widow against the grantee in a voluntary deed from her husband of nearly the whole of his property, to have such deed declared fraudulent and void as against her rights, she is competent to testify as to what passed in an interview between herself and the defendant, and as to certain letters from him to her husband found in his desk after his death. *Sanborn v. Lang*, 84.

13. In a proceeding to have a deed declared fraudulent and void as against the rights of the widow of the grantor, his declarations to the conveyancer with respect to the deed, and his object and purpose in making it, being contemporaneous with its preparation and execution, are admissible in evidence. *Ib.*

See CONTRACT, 2, 3, 4, 8; CRIMINAL LAW, 1, 3.

### FRAUDULENT CONVEYANCE.

A creditor may avoid or set aside a fraudulent conveyance of his debtor's property for the satisfaction of his debt, without first exhausting the debtor's other property, or showing that the debtor has no other property liable to be taken. *Westerman v. Westerman*, 142.

### GUARANTY.

Though a guaranty should ordinarily be construed according to its import, like other instruments, the guarantor cannot be held to an interpretation materially different from the explicit wording; as, for example, to secure the payment of notes running six months, where he had made himself responsible for notes due in four; nor where the rate of interest is increased. *Locke v. McVean*, 422.

### HIGHWAY.

1. The use of steam power for purposes of locomotion on the common highways is not unlawful, provided due care is observed, and a proper regard had to the rights of others. *Macumber v. Nichols*, 345.
2. The fact that one, for a lawful purpose, takes into the highway an object which is calculated to frighten horses of ordinary gentleness, does not necessarily render him liable for any resulting injury. Those who make use of the highway by means of horses have no rights superior to others, and new modes of locomotion are perfectly admissible, provided they are reasonably consistent with existing modes. If injury results, the question of liability is a question whether reasonable care has been observed; and this is a question of fact, and must be submitted to the jury as such. *Ib.*

### HUSBAND AND WIFE.

Under the Act of May 1, 1851 (S. & S. 389), as amended March 23, 1866 (S. & S. 391), the separate property of the wife is *primarily* liable, as between her and the husband, for the satisfaction of judgments recovered in actions brought against them upon causes existing against her at their marriage; and the husband, when compelled to pay any such judgment, becomes, in equity, a creditor of the wife to the amount paid, and entitled to charge the same upon her separate property, and for that purpose to set aside fraudulent conveyances thereof made in contemplation of marriage. *Westerman v. Westerman*, 142.

See EVIDENCE, 7, 8, 12, 13.

### INJUNCTION.

See JUDGMENT.

### INSURANCE.

1. Policies of insurance, like other contracts, are to receive a reasonable construction, so as not to defeat the intention of the parties. *West v. Citizens' Ins. Co.* 353.
2. A policy of insurance issued to a mercantile partnership on a stock of goods owned by the firm, and with which they are carrying on business, which contains no provisions limiting or restricting alienation of the property, is not avoided by a sale by one partner to his copartners, who continue the partnership business, of his interest in the stock of goods. *Ib.*
3. When the policy contains a provision that the assignment of the same, or any interest therein, without the assent of the company indorsed thereon, avoids it, such a sale, and the assignment by the retiring partner to his copartners, who continue the business, of his interest in the policy does not avoid it. *Ib.*
4. In case of loss after such sale and transfer, the remaining partners, being the real parties in interest, should sue on the policy, and in such action they are not limited in the amount of recovery to their interest in the partnership goods before such sale and transfer, but can recover for the whole loss. *Ib.*
5. Where a party to a negotiable instrument with blanks unfilled intrusts it to the cus-

tody of another for use, such negotiable instrument carries on its face an implied authority to fill the blanks necessary to perfect it. The rule is, that, as between the holder to whom the instrument is intrusted and innocent third parties, the holder is to be regarded as the agent of the party committing it to his custody for the purpose of filling the blanks. But there is no implied authority that the holder may do anything more than *fill the blanks*. Any erasure or addition amounts to forgery and renders the instrument void. Nor is actual notice of any alteration necessary if the instrument shows the alteration on its face. These doctrines are applicable to an order for the delivery of funds signed by the authorized officer of an insurance company and intrusted to a sub-agent. *Angle v. Northwestern Mutual Life Ins. Co.* 398.

6. The policy issued by a life insurance company provided that promissory notes payable during the year might be given by the assured for portions of the annual premium, and declared that in case such notes were not paid at maturity the policy should then and thereafter be void, without notice to any party or parties interested therein, and the notes also contained the same stipulation. *Held*, that the payment at maturity of the notes given for the premium was a condition precedent to the continuance of the policy, and on a failure to pay the notes the policy became void. *Thompson v. Knickerbocker Life Ins. Co.* 370.
7. Where it was the custom of a life insurance company to give notice to the assured that the premium or premium note was about falling due, a neglect on the part of the company to give notice will not save the policy from forfeiture, if the assured fails to pay the premium or premium note when due, unless the failure to give notice was fraudulent, and for the purpose of throwing the assured off his guard. *Ib.*
8. Where a policy of life insurance and a premium note contained the stipulations set out in the first head-note, and the premium note was not paid at maturity: *Held*, that the insurance company was not bound to elect whether or not the policy should be forfeited, or to give any notice of such election. *Ib.*
9. Where it was the custom of a life insurance company not to exact punctual payment of its premium notes, but to allow thirty days' grace thereon, the company is not bound to pay the insurance money if the assured dies within the thirty days without having paid the premium note. *Ib.*

See JURISDICTION, 2.

## INTEREST.

Under a contract for the payment of interest at a specified rate annually upon default of payment, interest on the interest will be computed at six per cent. *Cramer v. Leeper*, 332.

## INTOXICATING LIQUORS.

1. To constitute a liability under the provisions of the seventh section of the law "To provide against the evils resulting from the sale of intoxicating liquors" (2 S. & C. 1432); before the same was amended, where the action is to recover for injuries resulting from habitual intoxication during a period of years, it is not essential to a recovery that the defendant shall have been the *sole* cause of such habitual intoxication. *Boyd v. Watt*, 524.
2. In such case, where the right of action is for the damages to person, property, or means of support, resulting from such habitual intoxication, one who contributes to cause that condition by his illegal sales, which of themselves tend to, and are calculated to produce that result, is presumed to have intended it, and is liable for the damages resulting, though others may, by their illegal sales, have contributed thereto, without his knowledge, or without preconcert with him. *Ib.*
3. Where the damages resulting arise from incapacity for business, and loss of estate, caused by such habitual intoxication, and it becomes impossible to separate the damages caused by others from those caused by the defendant, he is liable for all such damages, if the natural and probable consequences of his illegal acts were to cause such injury. *Ib.*
4. The statement of a physician, who was in the habit of getting intoxicated, made at the times of his purchases of liquor, that he wanted it for a patient, and for medical purposes, does not, in the absence of proof to the contrary, raise the presumption that it is a sale to the patient. *Ib.*

## JUDGMENT.

1. A judgment for \$6,000 was recovered in an action of *tort* by U. against C. in the superior court of Baltimore city in 1871, and was affirmed by the court of appeals in 1873. Prior to the institution of that suit, namely, in 1866, U. became indebted to C. in the sum of \$11,000, for which, with interest thereon, C. held the promissory notes of U. secured by a deed of trust to R. conveying certain lands in Virginia. In 1868 C. instituted proceedings in equity in Virginia to enforce his claim against the property conveyed by the deed of trust. This claim was resisted by U. upon the alleged ground of fraud and usury, and by other defendants in the cause, who claimed to hold liens upon one of the parcels of land described in the deed of trust, prior and superior to the lien of C.; but the court in 1871 passed a decree in favor of C., not only against U. but also against the other defendants in the suit, and adjudged that C. was entitled to a priority of lien as against the property. From that decree the parties defendants took an appeal to the court of appeals of Virginia. U. being indebted to his attorneys, M. and F., for professional services rendered by them in the aforementioned action of *tort*, he having contracted, at the time of retaining them to prosecute the suit, to pay them one third of the amount which might be recovered, assigned the judgment therein recovered to them, to the extent of \$2,000, being the one third thereof. U. being indebted to other persons, the said judgment was entered to their use to the extent of their respective claims; these latter uses being entered subject to the previous entry to the use of M. and F. Upon failure by C. to pay to M. and F., upon their demand, the sum of \$2,000 with the costs adjudged by the court of appeals of Maryland, they caused a *fiery facias* to be issued out of said court in the name of U. against C., who thereupon filed his bill to restrain by injunction the enforcement of the judgment against him, until the determination of the proceedings pending in the court in Virginia, and until the mutual claims and demands of the complainant and U. should be adjusted by proper accounts to be taken between them under the direction of the court. The relief sought by the complainant was asked on the ground of an equitable set-off, the bill charging that he was precluded by the ordinary rules of law from setting up his claim against U. in the action of *tort*, in which the judgment was recovered. U., the judgment creditor, was utterly insolvent. *Held*: 1st. That the complainant was entitled to the equitable right of set-off, not only as against U. but also as against the parties to whose use the judgment was entered, and consequently entitled to be protected by injunction against the enforcement of the judgment. 2d. That, as against the equitable right of set-off, claimed by the complainant, M. and F. were not entitled to any lien upon the judgment, growing out of their contract with U., or for professional services rendered by them as attorneys in the suit. *Marshall v. Cooper*, 514.
2. The insolvency of a party seeking to enforce his judgment furnishes a sufficient ground for the interposition of a court of equity to enable the debtor to avail himself of a set-off. *Ib.*

See CONSTITUTIONAL LAW, 2; HUSBAND AND WIFE; PARTNERSHIP.

## JURISDICTION.

1. The fact that a suit affecting the prerogatives of a state has been settled by a state officer is immaterial as affecting the jurisdiction of an appellate court. *State v. Doyle*, 450.
2. In *Morse v. Ins. Co.* 20 Wall. 445, it was decided that the right of a corporation to remove a cause from a state to a United States court might be exercised, even though the party had agreed that the cause should not be removed, and that the agreement not to remove was not rendered valid by a state law authorizing it. The constitutionality of the state law was not in issue, and the decision that it was invalid was extrajudicial. A state statute providing that a corporation shall be compelled to file with a state officer, as a condition precedent to its doing business in the state, an agreement not to remove causes in which it is a party, is within the power of the state, even if the agreement is not valid in law. Such a statute is purely a matter of state policy and not subject to federal control in any form. If such a statute is unconstitutional, the state officer has no power to issue a license to the corporation, and should be commanded to revoke any license he may have issued. *Ib.*
3. When a court having jurisdiction of a case has appointed a receiver for the property which is the subject of the suit, and he is in possession, no other court of coordinate

jurisdiction can interfere with the property, or entertain complaints against the receiver, or undertake to remove him. *Young v. R. R. Co.* 91.

See RAILROAD, 10.

### JURY.

1. Generally speaking, it is not error to refuse to require a jury, when they do not ask for it, to take to their jury-room a will that is in suit before them, for the purpose of comparing the body of the document with the signature, to see if it is not vitiated by forgery. Such comparison would involve matters of opinion, and would put individual jurymen in the position of expert witnesses to handwriting, and that, too, in the jury-room, whereas all evidence must be given in open court. *In re Foster*, 411.
2. A juror violates his oath in coming to an opinion on statements of fact, not in evidence, but made to him by his fellow-juror in the jury-room. *Ib.*

### LICENSE.

The revocation of a license by a state official is a ministerial act. *State v. Doyle*, 450.

### MASTER AND SERVANT.

A railroad employee was killed in coupling a car that was lower than the rest. He had fully understood the risk incident to the use of the car, yet had not protested against its use to his employers, nor received from them any assurance that its use would be discontinued. The case was held not to be an exception to the rule that leaves the servant to bear the consequences of all the ordinary risks incident to his employment. *Gildersleeve v. Fort Wayne, &c. Railroad Co.* 118.

### MECHANIC'S LIEN.

1. Where the holder of a mechanic's lien, within the two years for which his lien remains operative, commences an action on his account, to obtain a personal judgment for the amount thereof, such lien is, by the provisions of the statute creating it, continued until the action is determined, and until the judgment obtained by the plaintiff is satisfied. *Ambrose v. Woodmansee*, 445.
2. The premises charged with such lien may be subjected to the satisfaction of the same, as against a purchaser in good faith, who bought without actual notice of plaintiff's claim, pending the action thereon, and after the expiration of said period of two years. *Ib.*
3. Under the statute to create a lien in favor of mechanics and others, the claim of a sub-contractor against the owner of the structure is limited to the work and materials furnished in performing a particular contract between the owner and contractor in relation to such structure; also to the amount unpaid on such contract at the time he delivers to the owner his attested account against the contractor for such work and materials. *Dunn v. Rankin & Co.* 436.
4. Where independent jobs are let under separate contracts, though between the same owner and contractor, the liens of the sub-contractors are respectively confined to the amount unpaid on the particular contract each one aided the contractor to perform. *Ib.*
5. When a contract for a structure provides for changes in the plans and specifications, and extra work is done in completing the structure without a new contract, a sub-contractor of any part of the job may perfect a lien on the amount due from the owner to the contractor for such extra work. *Ib.*
6. When a sub-contractor seeks a lien under the statute against a corporation as the owner, the delivery of his attested account against the contractor to the agent or officer of the corporation, who is duly authorized to enter into the contract, under which the job is done, in his own name, and to account to the contractor and sub-contractor in accordance with their respective rights, is sufficient notice to fix the lien against the corporation. *Ib.*

### MORTGAGES.

1. A constitutional provision that "all property shall be taxed according to its value" does not authorize the taxation of mortgages. *People v. Hibernia Savings Institution*, 241.
2. Junior mortgagees may file a bill to foreclose their mortgage without making prior mortgagees parties, but a sale in such a case would necessarily be made subject to the prior mortgages. *Young v. R. R. Co.* 91.
3. In such a suit the prior mortgagees can be made parties only by service of process or

voluntary appearance. A general notice calling upon them to present their claims will not make them parties or bind them. *Ib.*

4. If, however, such prior mortgagees are represented by trustees who are actual parties to the suit, then a notice calling upon them to present their claims before the master would be effectual, and the decree of the court would bind them. *Ib.*
5. When junior mortgagees have first brought their suit to foreclose, and the court has taken possession of the mortgaged property by a receiver, the senior mortgagees cannot gain possession of the property by a suit subsequently begun until the first suit is ended. *Ib.*

See USURY.

#### MUNICIPAL BONDS.

1. It must be taken to be a settled rule that where a municipal corporation has been authorized by legislative authority to subscribe for the stock of a railroad company, and to issue municipal bonds in payment of the subscription on the happening of some precedent contingency of fact, and where it may be gathered from the legislative enactment that the persons designated to execute the bonds were invested with power to decide whether the contingency had happened, their decision is final in a suit upon the bonds by a *bonâ fide* holder, and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive against the municipality.  
Where, therefore, the bonds sued on contained recitals that the legislative requirements had been complied with in every respect, and it appeared that the recitals were consistent with the act by virtue of which the bonds were issued, the municipality was held to be liable. MILLER, DAVIS, and FIELD, JJ., dissenting. *Marcy v. Town of Oswego*, 295.
2. Certain bonds contained the following recitals: "This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen County Railroad, and for the construction of the same through the said township, in pursuance of, and in accordance with, an act of the Legislature of the State of Kansas, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved February 25, 1870;' and for the payment of the said sum of money and accruing interest thereon, in manner aforesaid, upon the performance of the said condition, the faith of the aforesaid Humboldt township, as also its property, revenues, and resources is pledged." Held, that the building of the road was not a condition on which the payment of the bonds depended. *Marcy v. Township of Oswego* (3 Am. L. T. R. N. S. 295) approved. MILLER, DAVIS, and FIELD, JJ., dissenting. *Humboldt Township v. Long*, 330.
3. Where legislative authority has been given to a municipal corporation to subscribe for the stock of a railroad company, and to issue municipal bonds upon some precedent condition to the effect that the officers of the municipal corporation are invested with power to decide whether the condition has been complied with, the recital made in the bonds, that the condition has been complied with, is conclusive, and binds the municipal corporation to their payment in the hands of a *bonâ fide* holder. The case of *Marsh v. Fulton Co.* (10 Wall. 675) is not inconsistent with the above rule. *Town of Coloma v. Eaves*, 235.

#### MUNICIPAL CORPORATION.

1. A city having power by statute to construct public sewers, and to demand and receive pay from adjoining owners for liberty to enter their private drains into such sewers, is responsible for negligently suffering them to occasion a nuisance to the estates of such adjoining owners, if the nuisance does not result from the original plan of construction, and could be avoided by keeping them in proper condition. *Rowe v. Portsmouth*, 482.
2. In maintaining such public sewer, a city is bound to use that degree of care and prudence which a discreet and cautious individual would use if the whole loss or risk was to be his alone. *Ib.*
3. A city will not be liable for injuries caused to individuals, by an obstruction in such public sewer not placed there by its own officials or by authority of the city government, until after actual notice of such obstruction, or until, by reason of the lapse of time, actual notice may be presumed. *Ib.*
4. The legislature of a state has not the power to deny to the officers of a municipal corporation the discretion which they enjoy under the charter of the municipality concerning municipal improvements. *People v. Lynch*, 127.

See MUNICIPAL BONDS ; NEGLIGENCE, 1, 3, 4, 5, 6.

## NATIONAL BANK.

1. In the business of banking, the purchasing and discounting of paper is only a mode of loaning money; and a national bank is authorized thus to acquire notes and bills which are perfect and available in the hands of the borrower, as well as his own paper made directly to the bank. *Smith v. Exchange Bank of Pittsburg*, 427.
2. Where a note or bill is an existing security in the hands of the holder, the usury exacted by the bank in its acquisition is not available, by way of defence, to the antecedent parties. Their rights and liabilities are not affected by the usurious character of a transaction in which they did not participate. *Ib.*
3. The party with whom the bank had the usurious transaction is the party to whom, under the national banking act, the forfeiture of interest is to be adjudged; and who, in case the interest has been paid, is authorized to recover back twice the amount. *Ib.*
4. A national bank located in Kansas charged and received interest at the rate of 18 per cent. per annum: *Held*, that it was liable under the National Banking Act (Rev. Stats. secs. 5197, 5198) to pay back twice the amount of interest thus received. *Crocker v. First Nat'l Bank of Chetopa*, 350.
5. If the person who paid such illegal interest is adjudged a bankrupt, the right of action passes to his assignee in bankruptcy, such assignee being his "legal representative" within the meaning of sec. 5198 of the Revised Statutes. *Ib.*
6. The amount of the recovery is twice the full amount of interest paid, and is not limited to twice the excess of interest paid over the legal rate. *Ib.*

See BANKS AND BANKING.

## NEGLIGENCE.

1. In an action against a town to recover for injuries caused by a defective highway, which the town was bound to keep in repair, one of the plaintiffs, who were riding together in their carriage in the daytime, testified that the defect was a hole in the way, caused by the dropping down of the capstone of a culvert, that the other plaintiff was driving, and that he was not at the time looking ahead, but was looking as any other person would who was driving in a carriage. The plaintiff who was driving testified that she had no previous knowledge of the defect, that the horse was gentle and was walking at the time, and that she was then looking straight ahead. The evidence also showed that the road was rough, that there was mud and water upon it, and that there was room to pass safely upon the side of the way. One witness for the plaintiff testified that any one who was on the lookout could have seen the hole. The presiding judge, at the defendant's request, instructed the jury in substance, that if the plaintiffs in the daytime, and at a walk upon a broad and substantially level road, with ample width for passing by the hole, went into it, when it was conspicuous, obvious, and in plain sight, they were not in the exercise of due care, unless they show some excuse for their inattention to their track; and that the law requires of one riding in the daytime such attention to the road over which he is about to pass, as to see large holes that are conspicuous, obvious, and in plain sight, unless some sufficient reason excuses the inattention, and refused to give the further instructions requested by the defendant that no such excuse was offered or shown by the evidence in this case, and that there was no evidence in the case of due care on the part of the plaintiffs, or either of them. The judge, at the request of the plaintiffs, also instructed the jury that it was enough if the plaintiffs looked ahead in such a manner as persons of ordinary prudence usually do in riding upon a highway. The jury found for the plaintiffs. *Held*, that the last instruction was correct, that the other instructions were sufficiently favorable to the defendant, and that the case was rightly submitted to the jury. *Hill v. Inhabitants of Seekonk*, 302.
2. Where there are no exigencies to be weighed, whether the admitted facts constitute negligence or not is a question of law and not of fact. *Kellogg v. Curtis*, 419.
3. If a party by carelessness in making an excavation in his own ground causes the fall of, or injury to a house erected on the land adjoining, he is liable in damages for the injury. If a party acting under lawful authority inflict injury in the manner of executing the authority, as by unskillfulness or negligence, he is liable for the consequences. Damage done to the house of a party by reason of the excavation of a street by a railroad company made under lawful authority, is not *damnum absque injuria*, and he may recover therefor without showing that the power delegated to the company has been illegally or negligently exercised. *Balt. & Potomac R. Co. v. Reaney*, 214.

4. As against a municipal government in the careful exercise of its right and power to grade, change, and improve a street, there can be no right of action for any unavoidable injury done; but as against a private corporation in nowise connected with the municipal government, obtaining authority to use the streets in an extraordinary manner for its own private purposes and profit, the case is quite different. As against such party the owner of a lot of ground with a building thereon, bounding on a street, is entitled to the natural support which the bed of the street may afford to the foundation of his house. And notwithstanding authority may have been obtained both from the city and the state legislature, to make the extraordinary use of the street, yet that authority must be exercised at the peril of the party to whom it is delegated; and if any injury accrues to private property in the exercise of the power, the party producing it must be held liable. And such liability arises even though the injury is the natural or inevitable result or consequence of the act authorized to be done. *Ib.*
5. The owner of the corner house bounding on the street excavated, being entitled to such support to the foundation of his building as the bed of the street afforded before it was excavated, if the adjoining house was bound to the corner house, and was lawfully dependent upon it for its stability, the disturbance of the natural support of the corner house by the act of the party making the excavation, whereby injury is done to the adjoining house, furnishes the owner of the latter a cause of action that entitled him to recover for such injury. *Ib.*
6. The measure of damages in such case would be a sum that would compensate the plaintiff for the injuries done to his particular interest in the premises. *Ib.*
7. Whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes, if those intervening causes were set in motion by the original wrong-doer.

See BAILOR AND BAILEE; HIGHWAY.

#### PARDON.

See ATTORNEY, 5.

#### PARTNERSHIP.

1. After the dissolution of a copartnership, one of the partners, in a suit brought against the firm, has no authority to enter an appearance for other partners who do not reside in the state where suit is brought and have not been served with process. And a judgment against all the partners formed upon such an appearance may be questioned by those not served with process in a suit brought thereon in another state. *Hall v. Lanning*, 105.
2. The outgoing members of a firm that is dissolved, are sureties on a partnership debt for those who remain, but they are discharged if the latter, without their knowledge or consent, substitute a new debt that increases their liability. *Smith v. Sheldon*, 542.

#### PATENT.

1. The decision of the commissioner of patents in the allowance and issuance of a patent creates only a *prima facie* right, and is not conclusive upon the question of invention or patentability. *Reckendorfer v. Faber*, 304.
2. A combination of elements to constitute invention must involve more than convenience and utility, — there must be a new result produced by a new union. A combination that falls short of this is not the proper subject of letters-patent. Hence there is nothing patentable in the attachment of a piece of rubber to a lead pencil, although the two may be claimed as a combination and otherwise. *Ib.*
3. Invention defined and illustrated. *Ib.*
4. To defeat a patent on the ground of want of novelty, the thing relied upon must embody the substance of the thing patented. Whatever would be an infringement of the patent will defeat it. *Sewall v. Jones*, 120.
5. To recommend a method of practising an invention does not make the method a part of the patent. *Ib.*

#### PLEADING AND PRACTICE.

1. It is unnecessary to aver matter of law or public statute, of which the court takes judicial notice. *Young v. The Railroad Company*, 91.
2. Where a state is concerned in the subject matter of the suit it should be made a



party, if that can be done; but the fact that the state cannot be sued is a sufficient excuse for not making it a party. *Ib.*

3. Where a state was an indorser of bonds secured by a statutory mortgage, it was not considered a necessary party, in a suit brought by holders of bonds secured by the mortgage, to foreclose the same. *Ib.*

See FRAUDULENT CONVEYANCE; JURY; PARTNERSHIP; REMOVAL OF CAUSES.

#### RAILROAD.

1. A child about nine years old was sent by his mother, who resided in Harrisburg, near defendants' railroad, on an errand across the road; whilst on the track he was killed by an engine going westward. There were iron works and houses for the hands on the opposite side of the road at that point, which was in the outskirts of the city; and the hands of the works and other persons were frequently crossing the track about the place. East of where the boy was struck was a curve, which prevented the engineer from seeing him till within too short a distance to stop the train after he was seen. There was no ordinance of the city limiting the rate of running trains at that point. There was evidence that the train was running at a high rate of speed. *Held*, that whether the train was running at a rate of speed which was safe and prudent under the circumstances was for the jury. *Pennsylvania Railroad Co. v. Lewis*, 490.
2. It is not common prudence or ordinary care for trains to enter the outskirts of a city at a dangerous rate of speed, although the people have no right to go on the railroad track. *Ib.*
3. Although persons on a railroad track are trespassers, regard must be paid to the habits, character, condition, and circumstances of people living in a city and immediately on the line of a railroad. *Ib.*
4. The commonwealth by its police power may regulate positive rights when for the safety, protection, and welfare of the people; and the speed of trains through towns and cities may be regulated by ordinance. *Ib.*
5. When it is determined by the jury on the facts submitted to them that the rate of speed of a train is incompatible with public safety under the circumstances of the place, the rights of a company, even on its own track, are qualified by the law of the public good. *Ib.*
6. The court charged: "If the boy (being on the track) had sufficient judgment and discretion to know his danger, and did not exercise the ordinary care that one of his age and maturity should, he was guilty of such negligence as would prevent him from recovering," &c. *Held* not to be error. *Ib.*
7. There was evidence in this case of contributory negligence by the parents as to exposing their son to danger, and submitted with proper instructions. *Philadelphia & Reading Railroad Co. v. Hummel*, 8 Wright, 375, distinguished. *Ib.*
8. Construction of the statute of Vermont in respect of property destroyed by locomotive engines used by railroad companies. *Gr. Tr. R. W. Co. v. Richardson*, 166.
9. The imprudent location of property in proximity to the track of a railroad company does not necessarily excuse negligence on the part of the company. *Ib.*
10. (1.) A railroad company having its residence and principal office at Atlanta, Georgia, conveyed to trustees by one deed, all its line of road extending from Atlanta through South Carolina to Charlotte, North Carolina, and other property to secure the payment of the principal and interest of 4,248 bonds of \$1,000 each, issued by the railroad company. The railroad was an indivisible and inseparable piece of property, which could not be divided, without injury to its value. The trust deed conferred authority on the trustees, and made it their duty, in case the railroad company failed, to pay either the interest or principal of the bonds, to take possession of the property conveyed by the trust deed, and advertise and sell the same or such part as might be necessary, at Atlanta, to pay the sum in default. *Held*:—
  - (a.) That on default made in the payment of interest and a demand upon the trustees by the bondholders that they should take possession of the trust property and a failure of the trustees to do so, the court on a bill filed by the bondholders to require them to execute the trust would compel them to take possession of the trust property or appoint a receiver for that purpose.
  - (b.) Such appointment would be made even though there was no probable deficiency of the trust property to pay the debts, secured by the trust deed.
  - (c.) When it was represented that the trust property had fallen into the hands of two different receivers, accountable to three different courts, to the manifest detriment of the trust estate, that fact of itself was considered a sufficient reason for the appoint-

- ment of a receiver for the whole property, if the court had jurisdiction to make such appointment.
- (d.) The circuit court of the United States for the Northern District of Georgia has jurisdiction to appoint a receiver for the entire line of said company's road, and other property included in the deed of trust, whether within or without the state.
  - (2.) Two states may by concurrent legislation unite in creating the same corporate body.
  - (3.) Where a bill was filed the prayer of which was that this court would construe a trust deed executed by a railroad company, and compel the trustees to execute the trust or appoint a receiver to take possession of, and administer, the trust property, and service of subpoena had been made on the railroad company, which was the principal defendant, and a restraining order had been allowed, and also served on the railroad company, enjoining it from delivering possession of the trust property to any one except a receiver, appointed by this court in the case thus commenced, *held*, that by these proceedings the court acquired constructive possession of the trust property; and that possession thereof taken, under color of process from another court, in a suit commenced after the proceedings above mentioned, was in contempt of the process and jurisdiction of this court, even though the other court first obtained actual possession of the property. (Per Woods, Circuit Judge.)
  - (4.) *Contra*. Service of process gives jurisdiction over the person; seizure gives jurisdiction over the property; and until the property is seized, no matter where the suit was commenced, the court does not have jurisdiction over it. Thus, when two suits between different parties, raising different controversies, and having different purposes in view, are commenced in courts of coordinate jurisdiction, and the possession of the property, which is the subject of the suit, is necessary to the relief asked in each case, that court which first seizes the property acquired jurisdiction over it, to the exclusion of the other, no matter when the suits were commenced, or process *in personam* served. (Per Bradley, Circuit Justice.)
  - (5.) When certain bondholders secured by a deed of trust, filed, in behalf of themselves and all other bondholders secured by the same deed, who chose to come in as complainants, and bear their share of the expenses of the suit, a bill against the trustees named in the deed, to have the trust administered, and the trust property sold, and its proceeds distributed, and the other bondholders were numerous and some of them unknown; *held*, that it was no valid objection to the making of a decree, in accordance with the prayer of the bill, that all the bondholders were not made parties; they might be allowed to come as complainants, or might propound their claims before the master.
  - (6.) A trust deed executed by a railroad company to secure bondholders construed.
  - (7.) When a railway is conveyed by a trust deed or mortgage to secure bonds, and it cannot be divided and sold in pieces without manifest injury to its value, the whole may be sold, before the principal is due, on default in the payment of interest.
  - (8.) If two railroad corporations created by different states join in making a trust deed conveying their joint property to secure bonds issued by them jointly, and suit is brought to enforce the trust, in the district where one of the corporations resides, and it is served with process, and the other corporation, being a non-resident of the state or district where the suit is brought, enters its appearance and files an answer jointly with the other, both will be bound by the decree of the court.
  - (9.) The Atlanta & Richmond Air Line Railway Company executed the deed of trust, mentioned in the first head-note: *Held*, that the court has jurisdiction to decree that the trustees should sell the entire line of road according to the terms of the trust, notwithstanding, a large part of the road lay beyond the territorial jurisdiction of the court; and that a sale and deed under such decree would convey a good title to the whole.
  - (10.) Penalty of bond for appeal fixed under rule 32 of the supreme court. *Wilmer v. Atlanta, &c. Air Line R. W. Co.* 29.
  11. The employees of a defaulting railroad company are not to be regarded as creditors at large in respect of their claims for wages in arrears at the time of the appointment of a receiver for the company. *Duncan v. Chesapeake & Ohio R. R. Co.* 194.
  12. When mortgagees come into a court of equity seeking satisfaction of their claims against a railroad company by suit for foreclosure, they should be required to satisfy all arrearages of pay due employees out of the trust property or its future earnings. *Ib.*
  13. An act of the legislature authorized the governor to indorse in behalf of the state the first mortgage bonds of a railroad company, bearing interest at the rate of eight per cent. per annum; the governor indorsed the bonds, and referred to the act in his

indorsement as the authority therefor: *held*, (a) That the act authorized the indorsement of bonds bearing interest at eight per cent. per annum in gold. (b) That *bond fide* holders for value, of the bonds indorsed by the governor assuming to act under said authority, were not to be charged with constructive notice of the fact that the bonds so indorsed were not first mortgage bonds. *Young v. R. R. Co.* 91.

14. An act, passed subsequent to the one authorizing the indorsement of the said bonds, gave authority to the governor to indorse the bonds of the railroad company, notwithstanding there was a prior lien on said company's railroad, but it was claimed that this law did not pass the legislature by the vote required by the Constitution, and was therefore null and void; yet that it was nevertheless constructive notice to the bondholders of the fact that the bonds owned by them were not first mortgage bonds: *held*, that if this enactment were valid, it cured any defect in the authority of the governor to indorse the bonds, and that if it were not valid but void, it was not constructive notice to anybody of anything. *Ib.*

See DAMAGES; EVIDENCE, 2, 3, 4; MASTER AND SERVANT; MORTGAGE, 3, 4, 5; SUBROGATION.

## REGULATION OF COMMERCE.

See CONSTITUTIONAL LAW, 9 *et seq.*

## REMOVAL OF CAUSES.

1. In accordance with the provisions of the Revised Statutes of the United States, enacted June 22, 1874, and the subsequent Act of Congress of March 3, 1875, a cause will not be removed from a state court to the circuit court of the United States, unless the petition for such removal be filed in the state court before or at the term at which said cause could first be tried, and before the first trial thereof. Such petition will not, therefore, be entertained, when filed in the state court after a verdict in the cause has been rendered, notwithstanding the verdict may have been set aside for error and a new trial ordered. *Chandler v. Coe*, 291.
2. In cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different states, it rests with Congress to determine at what time the power may be invoked, and upon what conditions; whether originally in the federal court, or after suit brought in the state court; and in the latter case, at what stage of the proceedings; whether before issue or trial by removal to a federal court, or after judgment upon appeal or writ of error. *Gaines v. Fuentes*, 361.
3. As the Constitution imposes no limitation upon the class of cases involving controversies between citizens of different states, to which the judicial power of the United States may be extended, Congress may provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary. *Ib.*
4. The Act of Congress of March 2, 1867, in authorizing and requiring the removal to the circuit court of the United States of a suit pending or afterwards brought in any state court involving a controversy between a citizen of the state where the suit is brought and a citizen of another state, thereby invests the circuit court with jurisdiction to pass upon and determine the controversy, when the removal is made, though that court could not have taken original cognizance of the case. *Ib.*
5. A suit to annul a will as a muniment of title, and to restrain the enforcement of a decree admitting it to probate, is in essential particulars a suit in equity; and if by the law obtaining in a state, customary or statutory, such a suit can be maintained in one of its courts, whatever designation that court may bear, it may be maintained by original process in the circuit court of the United States, if the parties are citizens of different states. *Ib.*

## REVISED STATUTES.

The Revised Statutes must be taken to be an act passed on the first day of December, 1873, and all acts of later date, passed at the same session, are to be treated as subsequent acts. *In re Oregon Bulletin Printing Co.* 469.

## SET-OFF.

See JUDGMENT.

## STATE.

A state cannot be sued indirectly by proceedings against one of its officers, and where so sued in a federal court the jurisdiction of the state courts will not be ousted. Even if the federal court has granted an injunction, the state court may issue a writ of mandamus to the party enjoined commanding him to violate the federal writ. *State v. Doyle*, 450.

See PLEADING AND PRACTICE, 2, 3.

## SUBROGATION.

A state indorsed the bonds of a railroad company, and was indemnified against loss on account of the indorsement by a statutory mortgage on the railroad property; held, that the fact that the state could not be sued was no reason why the holders of the bonds so indorsed should not be subrogated to the rights of the state and have the benefit of the security. *Young v. R. R. Co.* 911.

## TAXATION.

1. The council of the city of Richmond has authority, under the charter of the city, to impose a license tax upon a foreign telegraph company having an agency in the city and doing business therein. And there is nothing in the constitutions and laws of the state or of the United States which forbids such a tax, if it is equal and just in its provisions. *Western Union Telegraph Co. v. City of Richmond*, 148.
2. Though the ordinance of the city imposing taxes speaks only of persons or firms doing business in the city, yet it imposes a tax in terms on telegraph companies, and obviously intends to include incorporated companies as well as individuals. *Ib.*
3. Corporations are to be deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute. *Ib.*
4. Corporations which derive their existence and exercise their franchises under authority of state laws, but are employed by the national government for certain duties and services, may be exempted by Congress from any state taxation which will really prevent or impede such services; but in the absence of legislation by Congress to indicate that exemption, if deemed essential to the performance of governmental services, it cannot be claimed on the mere ground that the corporation is employed as an agency of the government. And the tax may be either upon the property or business of the corporation. *Ib.*
5. The cases recognize a distinction between taxation of the property belonging to a private corporation employed by the government, and taxation of the instrumentalities or means of the government in the possession of such corporations. The state may tax a banking institution, but it cannot tax the currency or the government's bonds belonging to such bank. It may tax the railroad, but not the mail or the munitions or other property of the government. It may tax the contractor with the government, though not the contract. *Ib.*
6. While this court does not lay down any absolute rule limiting the powers of a court of equity in restraining the collection of taxes, it declares that it is essential that every case be brought within some of the recognized rules of equity jurisdiction, and that neither illegality or irregularity in the proceedings, nor error or excess in the valuation, nor the hardship or injustice of the law, provided it be constitutional, nor any grievance which can be remedied by a suit at law, either before or after the payment of the tax, will authorize an injunction against its collection. *Taylor v. Secor*, 266.
7. This rule is founded on the principle that the levy of taxes is a legislative and not a judicial function, and the court can neither make nor cause to be made a new assessment if the one complained of be erroneous, and also in the necessity that the taxes, without which the state could not exist, should be regularly and promptly paid into its treasury. *Ib.*
8. *Quere*: Whether the same rigid rule against equitable relief would apply to taxes levied solely by municipal corporations for corporate purposes as that here applied to state taxes? Probably not. *Ib.*
9. No injunction, preliminary or final, can be granted to stay collection of taxes until it is shown that all the taxes conceded to be due, or which the court can see ought to be paid, or which can be shown to be due by affidavits, have been paid or tendered without demanding a receipt in full. *Ib.*
10. While the Constitution of Illinois requires taxation, in general, to be uniform and

equal, it declares, in express terms, that a large class of persons engaged in special pursuits, among whom are persons or corporations owning franchises and privileges, may be taxed as the legislature shall determine, by a general law, *uniform as to the class upon which it operates*, and under this provision a statute is not unconstitutional which prescribes a different rule of taxation for railroad companies from that for individuals. Nor does it violate any provision of the Constitution of the United States. *Ib.*

11. The capital stock, franchises, and all the real and personal property of corporations are justly liable to taxation, and a rule which ascertains the value of all this by ascertaining the cash value of the funded debt and of the shares of the capital stock as the basis of assessment, is probably as fair as any other. *Ib.*
12. Deducting from this the assessed value of all the tangible real and personal property which is also taxed, leaves the real value of the capital stock and franchise subject to taxation as justly as any other mode, all modes being more or less imperfect. *Ib.*
13. It is neither in conflict with the Constitution of Illinois nor inequitable that the entire taxable property of the railroad company should be ascertained by the state board of equalization, and that the state, county, and city taxes should be collected within each municipality on this assessment, in the proportion which the length of the road within such municipality bears to the whole length of the road within the state. *Ib.*
14. The action of the board of equalization in increasing the assessed value of the property of a railroad company or an individual, above the return made to the board, does not require a notice to the party to make it valid, and the courts cannot substitute their judgment as to such valuation for that of the board. *Ib.*
15. The supreme court of the State of Illinois having decided that the law complained of in these cases is valid under her Constitution, and having construed the statute, this court adopts the decision of that court as a rule to be followed in the federal courts. *Ib.*

See MORTGAGE.

#### USURY.

Where one purchases land subject to a mortgage lien, and as part of the consideration agrees to pay the mortgage debt, he cannot defend against the mortgage on the ground of usury. *Cramer v. Lepper*, 332.

#### WILL.

1. A bequest in favor of an attorney who writes the will is not necessarily invalid. *Riddell v. Johnson's Executor*, 171.
2. The *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. *Ib.*
3. If a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument; in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. *Ib.*
4. J. was an unmarried man with a large property, having a large amount in bonds. B. had been his counsel for years, in whom J. had great confidence, and for whom he had a strong regard. In February, 1867, B. wrote J.'s will, in which he gave the most of his real estate to a number of his illegitimate children, who were colored persons. He then did not dispose of his bonds, which were in B.'s hands for collection. In June following, J. sent for B. to write a codicil to his will, and after some previous provisions as to real estate among the same parties, and providing for the payment of his debts and expenses of administration, and any orders he might draw upon B. in his lifetime out of the collections from the bonds, he gave whatever remained of these bonds in the hands of B. at J.'s death to B. absolutely. J. had a number of next of kin, and among them two sisters, to none of whom did he leave anything. It being clearly proved that J. was entirely competent to make a will; that he dictated the bequest in favor of B. without any suggestion from B. or any other person, and repeated it; that it was read to him, and he clearly understood it, and intended it to be as it was written: and it appearing further that he had been on bad terms with his family for years, and had expressed more than once his determination that none of them should have any of his estate; the bequest to B. was held to be a valid bequest. *Ib.*

See EVIDENCE, 5, 6; REMOVAL OF CAUSES, 5.



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## CONTENTS.

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	PAGE
ASSESSOR. Tort against, for assessing illegal tax.....	110
CONFEDERATE BONDS. Investment of trust funds in.....	15
CONTRACT to "complete" work commenced under specifications by another.....	47
To construct house. Change of plans. Measure of recovery.....	93
DIGEST OF CASES published in contemporaneous American legal periodicals. .8, 22, 35, 56, 72, 104, 113, 129, 145, 161	72, 104, 113, 129, 145, 161
EQUITY PRACTICE IN U. S. COURTS. Rehearing.....	78
EVIDENCE. Parol Evidence to vary written contract.....	63
FEDERAL QUESTION. Contract extinguished by war.....	159
INSTRUCTION TO JURY. Expression of opinion by judge.....	127
NOTES OF NEW BOOKS.....	15, 48, 112, 128, 144, 160, 176
NOTES OF OPINIONS, DECISIONS, AND ORDERS OF THE SUPREME COURT U. S.....	1, 17, 33, 49, 65, 81, 86, 97
TRADE-MARK. La Grande Chartreuse.....	111
False representation as to origin, &c.....	174

### CASES REPORTED.

Alger v. Inhabitants of Easton.....	110
Bullock v. Wallingford.....	46
Burke v. Maxwell.....	127
Clever v. Kirkman.....	63
Goldsmith v. Hand.....	93
Knotts v. Stearns.....	15
Phila. Hydraulic Works v. Schenck.....	47
Reeves v. Keystone Bridge Co.....	78



# THE AMERICAN LAW TIMES.

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## NOTES OF OPINIONS, DECISIONS, AND ORDERS

OF THE

### SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1875.

*Monday, October 25, 1875.*

No. 25. *Francis Dainese, plaintiff in error, v. Charles Hale.* In error to the Supreme Court of the District of Columbia. Mr. Justice Bradley delivered the opinion of the court reversing the judgment of the said supreme court, with costs, and remanding the cause with directions to allow the defendant to amend his plea on payment of costs.

The following are the points decided in this case:—

(1.) Judicial powers are not necessarily incident to the office of consul, although usually conferred upon consuls of Christian nations in Pagan and Mahometan countries, for the decision of controversies between their fellow-citizens or subjects residing or commorant there, and for the punishment of crimes committed by them. (2.) The existence and extent of such powers depend on the treaties and positive laws of the nations concerned. In Turkey, for example, the judicial powers of consuls depend on the treaty stipulations conceded by the government of that country, and on the laws of the several states appointing the consuls. (3.) The treaty between the United States and Turkey, made in 1862 (if not that made in 1830), has the effect of conceding to the United States the same privilege in respect of consular courts and jurisdiction which are enjoyed by other Christian nations, including civil as well as criminal jurisdiction; and the act of Congress of June 22, 1860, established the necessary regulations for carrying the jurisdiction into effect. (4.) But as this jurisdiction is, in terms, only such as is allowed by the laws of Turkey, or its usages in its intercourse with other Christian nations, those laws or usages must be shown in order to know the precise extent of the jurisdiction. (5.) The court cannot ordinarily take judicial notice of foreign laws and usages; a party claiming the benefit of them, by way of justification, must plead them. (6.) The defendant, as Consul General of Egypt, in 1864, issued an attachment against the goods of the plaintiff, there situate, neither the plaintiff nor the persons at whose suit the attachment was issued being residents or sojourners in the Turkish dominions, but both being citizens of the United States. For this act the plaintiff brought suit to recover the value of the goods attached. The defendant pleaded his official character, and, as incident thereto, claimed jurisdiction to entertain the suit in which the attachment was issued. *Held*, that the plea was defective for not setting forth the laws or usages of Turkey upon which, by the treaty and act of Congress conferring the jurisdiction, the latter was made to depend, and which alone would show its precise extent, and that it embraced the case in question. Reported in *extenso* in Chicago L. N., Dec. 18, 1875.

No. 10. *Edward Matthews, plaintiff in error, v. Nelson McStea.* In error to the Court of Common Pleas for the city and county of New York. Mr. Justice Strong delivered the opinion of the court, affirming the judgment of the said court of common pleas in this cause, with costs. The original cause of action in this case was (*inter alia*) an acceptance of a bill of exchange by the firm of Brander, Chambliss & Co., of New Orleans, it being alleged that Matthews was, at the time of the acceptance, a member of that firm. The bill of exchange was dated April 23, 1861, made payable in one year to the order of McStea, Value & Co., and it was accepted by Brander, Chambliss & Co., on the day of its date. The principal defence, and the only one which presented a federal question, was that at the time when the acceptance was made the defendant, Matthews, was a resident of New York, that the other members of the firm (also made defendants in the suit) were residents of Louisiana, and that before the acceptance the copartnership was dissolved by the war of the rebellion. This defence was not sustained in the common pleas, and the judgment of that court was affirmed by the court of appeals. The single question here presented is, whether the partnership was dissolved by the war before April 23, 1861, which is decided in the negative.

No. 9. *The Wilmington & Weldon Railroad Company, plaintiff in error, v. Henry King, executor.* In error to the Supreme Court of the State of North Carolina. Mr. Justice Field delivered the opinion of the court, reversing the judgment of the said supreme court, with costs, and remanding the cause for further proceedings in conformity with the opinion of this court. Dissenting, Mr. Justice Bradley. The opinion in this cause is published in *extenso* in the present issue of the Am. L. T. Reports.

No. 28. *John D. McLemore, plaintiff in error, v. The Louisiana State Bank.* In error to the Circuit Court of the United States for the District of Louisiana. Mr. Justice Davis delivered the opinion of the court, affirming the judgment of the said circuit court in this cause, with costs. The plaintiff was the owner of certain promissory notes, in possession of the commercial firm in New Orleans of which he was a member, which were pledged by the firm, in 1861 and 1862, to the bank, as security. This paper was not met at maturity, and with the collaterals pledged for its repayment remained in possession of the bank until the 11th June, 1863, when the bank was put in liquidation by order of Major General Banks, and its effects transferred to military commissioners, appointed to close it up. The officers of the bank, while submitting to this order, entered a protest against it, on their minutes. During the administration of the affairs of the bank by these commissioners, the pledged paper was sold for less than its face. In January, 1866, the military liquidation ceased, by order of Major General Canby, and the effects of the bank which were unadministered were restored to the corporators. The plaintiff, on the theory that the securities were parted with illegally, seeks to make the bank liable for the proceedings of the commissioners. It is held that the bank cannot be made responsible. Reported in *extenso* in Chicago L. N., Nov. 13, 1875.

No. 502. *The Farmers' & Mechanics' National Bank of Buffalo, plaintiff in error, v. Peter C. Dearing.* In error to the Court of Appeals of the State of New York. Mr. Justice Swayne delivered the opinion of the court, reversing the judgment of the said court of appeals, with costs. This case involved a construction of the 30th section of the National Bank Act. On the 2d of September, 1874, it was agreed between the parties that D. should make his promissory note to one E. for \$2,000, payable one month from date, and that the bank should discount the note for D. at the rate of interest of ten per cent. per annum. This agreement was carried out. The bank received the note and paid to D. the sum of \$1,981.67. The discount reserved and taken was \$18.33. The rate of interest which the bank was legally authorized to take was seven per cent. per annum. The excess reserved over that rate was \$5.50. D. failed to pay the note at maturity. The bank thereupon sued him in the superior court of Buffalo. He answered that the agreement touching the discount was usurious, corrupt, and illegal; that it avoided the note; and that he was in nowise liable to the plaintiff. The court sustained this defence and gave judgment for the defendant, which is here held to have been error; that the plaintiff was entitled to receive the principal of the note less the amount of interest unlawfully reserved. Reported in *extenso* in Cent. L. J., Nov. 19, 1875; Albany L. J., Nov. 13, 1875.

No. 27. *Thomas J. Semmes, claimant, &c., plaintiff in error, v. The United States.* In error to the Circuit Court of the United States for the District of Louisiana. Mr. Justice Clifford delivered the opinion of the court, affirming the judgment of the said circuit court in this cause, with costs. This case was one under the confiscation acts,

and involved questions of the regularity of certain proceedings. The judgment is affirmed upon the authority of *Miller v. U. S.* 11 Wall. 267; *Confis. Cases*, 20 Ib. 92, &c.

No. 4. *William J. McComb, surviving executor, plaintiff in error, v. The County Commissioners of Knox County.* In error to the Court of Common Pleas for the county of Richland, State of Ohio. Mr. Chief Justice Waite announced the decision of the court, dismissing the writ of error in this cause, with costs.

No. 26. *Edward Burgess, plaintiff in error, v. James C. Babbitt, assignee, &c.* In error to the Circuit Court of the United States for Eastern District of Missouri. Mr. Chief Justice Waite announced the decision of the court, affirming the judgment of the said circuit court in this cause, with costs.

No. 13. *Peyton Grymes, appellant, v. George S. Repplier et al.* Mr. Chief Justice Waite announced the order of the court, granting the motion to make proper parties in this cause.

Monday, November 1, 1875.

No. 482. *C. W. Upton, assignee, &c., plaintiff in error, v. J. D. Tribilcock.* In error to the Circuit Court of the United States for the District of Iowa. Mr. Justice Hunt delivered the opinion of the court, reversing the judgment of the said circuit court with costs, and remanding the cause, with directions to award a new trial. Dissenting, Waite, C. J., and Miller and Bradley, JJ. This case was an action by the assignee in bankruptcy to recover an unpaid subscription by the plaintiff in error to the stock of the insolvent Great Western Insurance Company, to which the defence was that the subscription had been obtained by the fraudulent representations of the agent of the company to the effect that eighty per cent. of the amount not paid in was non-assessable and would be paid by the profits, &c. It was also alleged as a defence that the agent represented that the note given for the twenty per cent. paid would not be parted with by the company, but would be leniently held to suit the convenience of the subscriber, and that afterward the note was transferred to a bank for collection, and that thereupon the subscriber had repudiated the subscription and asked to have the contract rescinded. The court hold that the defence will not avail to relieve the subscriber from his contract; that he became a stockholder under a certificate entitling him to the shares of stock named therein, and that the words "Not assessable" stamped across the face of the certificate did not import more at most than that he would not be liable to assessment after he had paid the full amount of the subscription, and could not in any event destroy the contract. It was said in this connection that the idea that the capital of a corporation is to be treated like a football to be thrown into the market for purposes of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention which will not be tolerated by the courts. Upon the question of the alleged rescission of the contract in consequence of the violation of the agreement as to the note, it is held that it was not before the jury; that the only question of fraud submitted was that in reference to the eighty per cent. of unpaid subscription, and that could not avail by reason of the want of diligence in the subscriber in not ascertaining his liability respecting it under the regulations of the company until it was demanded. Reported in *extenso* in Chicago L. N., Nov. 20, 1875.

No. 15. *The National Bank of Commerce of Boston, plaintiff in error, v. The Merchants' National Bank of Memphis.* In error to the Circuit Court of the United States for the District of Massachusetts. Mr. Justice Strong delivered the opinion of the court, reversing the judgment of the said circuit court, with costs. This case presents the question whether a bill of lading of merchandise made deliverable to order when attached to a time draft and forwarded with the draft to an agent for collection without any special instructions may be surrendered to the drawee upon his acceptance of the draft, or whether the agent's duty is to hold the bill of lading after the acceptance for the payment of the draft, and the court hold that the agent can be held liable to the owners of the draft for a breach of duty in surrendering the bills of lading on acceptance of the draft only after special instructions to retain the bills until payment of the acceptances. Reported in *extenso* in Chicago L. N., Nov. 20, 1875; Leg. Int., Nov. 26, 1875.

No. 29. *James Brown et al., appellants, v. Enoch Piper.* Appeal from the Circuit Court of the United States for the District of Massachusetts. Mr. Justice Swayne delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause with directions to dismiss the bill. This was a case involving the validity of letters patent granted appellees for a new process of preserving fish. The patent is held to be invalid for want of novelty.

No. 30. *Enoch Piper, appellant, v. George T. Moon et al.* Appeal from the Circuit Court of the United States for the Southern District of New York. Mr. Justice Swayne delivered the opinion of the court, affirming the decree of the said circuit court in this cause, with costs. This case involved the same question as No. 29 and was decided accordingly.

No. 12. *George D. Snow, impleaded with P. B. Clark, executor, &c., plaintiff in error, v. George W. Chapman, executor.* Mr. Chief Justice Waite announced the decision of the court, granting the motion to revive this cause. No opinion delivered.

No. 609. *Board of Liquidation, State of Louisiana, et al., appellants, v. Henry S. McComb.* Mr. Chief Justice Waite announced the order of the court, granting the motion to advance this cause.

No. 701. *H. B. Miller, collector, &c., et al., appellants, v. Morris K. Jessup et al.* No. 702. *Isaac Taylor, collector, &c., appellant, v. James F. Secor et al.* No. 703. *Herman Lieb et al., appellants, v. Henry P. Kidder et al.* Mr. Chief Justice Waite announced the order of the court, granting the motions to advance these causes.

Monday, November 15, 1875.

No. 8. *David Dows et al., plaintiffs in error, v. National Exchange Bank of Milwaukee.* No. 17. *David Dows et al., plaintiffs in error, v. Wisconsin Marine & Fire Insurance Company.* In error to the Circuit Court of the United States for the Southern District of New York. Mr. Justice Strong delivered the opinions of the court, affirming the judgments of the said circuit court in these causes, with costs and interest. This was a case of an alleged conversion of a cargo of wheat consigned to the defendant, and the verdict of the jury having established that there was such a conversion after coming into their possession, the only question here was whether the ownership of the plaintiffs had been divested before the conversion. It is held that it had not, and that the bank is entitled to recover. Reported in *extenso* in Chicago L. N., Nov. 27, 1875.

No. 17. *Dows et al. v. Wisconsin Marine & Fire Insurance Company.* Error to the Southern District of New York. This case is held to differ in no essential respect from No. 8, above, and is decided by the opinion in that case, Mr. Justice Strong delivering the opinion.

No. 36. *The Steamboat Eliza Hancock, &c., appellant, v. Charles S. Langdon.* Appeal from the Circuit Court of the United States for the Southern District of Georgia. Mr. Chief Justice Waite announced the decision of the court, affirming the decree of the said circuit court in this cause, with costs. No opinion delivered.

No. 40. *Henry Bruner and H. S. Moore, appellants, v. Le Roy P. Walker et al.* Appeal from the District Court of the United States for the Northern District of Alabama. Mr. Chief Justice Waite announced the decision of the court, affirming the decree of the said district court in this cause, with costs. No opinion delivered.

No. 545. *B. F. Potts, Governor, &c., et al., plaintiffs in error, v. William Chumasero et al.* No. 478. *Chy Lung, plaintiff in error, v. J. H. Freeman et al.* No. 646. *Henry M. Rector, appellant, v. The United States.* No. 692. *John C. Hale, appellant, v. The United States.* No. 762. *William H. Gaines & wife et al., appellants, v. The United States.* Mr. Chief Justice Waite announced the orders of court, granting the motions to advance these causes, and assigning them for argument on the 11th of January next.

Monday, November 29, 1875.

No. 33. *William H. Scudder, plaintiff in error, v. Union National Bank of Chicago.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Hunt delivered the opinion of the court affirming the judgment below, with costs and interest.

The case was this: The plaintiff below, the Union Bank, sought to recover from the firm of Ames & Co., of St. Louis, the amount of a bill of exchange, of which the following is a copy:—

“\$8,125.00.

“CHICAGO, July 7, 1871.

“Pay to the order of Union National Bank eight thousand one hundred and twenty-five dollars, value received, and charge it to the account of LELAND & HARBACH.

“To Messrs. Henry Ames & Co., St. Louis, Mo.”

By the direction of Ames & Co., Leland & Harbach had bought for them, and, on the 7th day of July, 1871, shipped to them at St. Louis 500 barrels of pork, and gave their

check on plaintiff to Hancock, the seller of the same, for \$8,000. Leland & Harbach then drew the bill in question, and sent the same by their clerk to the plaintiff to be placed to their credit. The bank declined to receive the bill unless accompanied by the bill of lading or other security. The clerk returned and reported accordingly to Leland & Harbach. One of the firm then directed the clerk to return to the bank and say that Mr. Scudder, one of the firm of Ames & Co. (the drawees), was then in Chicago and had authorized the drawing of the draft; that it was drawn against 500 barrels of pork that day bought by Leland & Harbach for them, and duly shipped to them. The clerk returned to the bank and made this statement to its vice-president, who thereupon, on the faith of the statement that the bill was authorized by the defendants, discounted the same and the proceeds were placed to the credit of Leland & Harbach. Out of the proceeds the check given to Hancock for the pork was paid by the bank. The direction to inform the bank that Mr. Scudder was in Chicago and had authorized the drawing of the draft was made in the presence and in the hearing of Scudder, and without objection by him. *Held*, that upon this state of facts, the firm of Ames & Co., the defendants, were liable to the bank for the amount of the bill.

No. 41. *Jabez A. Sawyer et al., appellants, v. Edward Turpin et al.* In error to the Circuit Court of the United States for the District of Massachusetts. Mr. Justice Strong delivered the opinion of the court, affirming the judgment of the said court below, with costs. In this case it is held that a mortgage not prohibited by the bankrupt act, when given and recorded before any rights of the assignee have accrued, is valid.

No. 37. *Annie Knotts et al., infants, &c., appellants, v. Franklin Stearns, executor, &c.* Appeal from the Circuit Court of the United States for the Eastern District of Virginia. Mr. Justice Field delivered the opinion of the court, affirming the decree of the court below, with costs. In this case it is held that a posthumous child does not possess, until born, any estate in the real property of which the father dies seized which can affect the power of the court to convert the property into a personal fund if the interest of the children then in being, or the enjoyment of the dower right of the widow, requires such conversion; also, that the purchase, under a decree of sale, has no concern with the application of the purchase money; hence he was not affected in his interests by the decree in this case, directing the proceeds of the sale to be invested in bonds of the Confederate States or Virginia securities. The sale was made without any reference to the Confederate government; but solely to raise a fund which would yield an income for the support of the widow and children, and was, therefore, a lawful proceeding. Affirmed.

No. 57½. *The United States, appellants, v. The Union Pacific Railroad Company.* Appeal from the Court of Claims. Mr. Justice Davis delivered the opinion of the court, affirming the judgment of the said court of claims in this cause. This case involves a construction of the acts of Congress concerning the rights of appellants. Reported in *extenso* in Chicago L. N., Dec. 11, 1875.

No. 38. *Francis Dainese, appellant, v. The Board of Public Works of the District of Columbia.* No. 39. *Same v. Same.* Appeals from the Supreme Court of the District of Columbia. Mr. Justice Miller delivered the opinion of the court, reversing the decrees of the said supreme court, with costs, and remanding the causes for further proceedings, including leave to amend pleadings, as may be in accordance with equity and with the opinion of this court. These cases are remanded on technical grounds for new trials.

No. 22. *Charles A. Nichols, assignee, &c., appellant, v. A. M. Eaton, appellee.* Appeal from the Circuit Court of the United States for the District of Rhode Island. Mr. Justice Miller delivered the opinion of the court, affirming the decree of the court below, with costs.

The case involved, chiefly, the questions whether, in view of the proposition that a will which expresses a purpose to vest in a devisee either personal property, or the income of personal or real property, and secure to him its enjoyment free from liability for his debts, is void, on grounds of public policy, as being in fraud of the rights of creditors, or, as expressed by Lord Eldon in *Brander v. Robinson*, 18 Vesey, 433, "If property is given to a man for his life, the donor cannot take away the incidents of a life estate." A provision in a will in the following words could be sustained: "Provided, also, that in case at any future period circumstances should exist, which, in the opinion of my said trustees, shall justify or render expedient the placing at the disposal of my

said children respectively any portion of my said real and personal estate, then it shall be lawful for my said trustees, in their discretion, but without its being in any manner obligatory upon them, to transfer absolutely to my said children respectively, for his or her own proper use and benefit, any portion not exceeding one half of the trust fund from whence his or her share of the income under the preceding trusts shall arise; and immediately upon such transfer being made, the trusts hereinbefore declared concerning so much of the trust fund as shall be so transferred shall absolutely cease and determine; and in case after the cessation of said income as to my said sons respectively, otherwise than by death, as hereinbefore provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them, to pay to or apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such part of the income to which my said sons respectively would have been entitled under the preceding trusts in case the forfeiture hereinbefore provided for had not happened." The provision is held to be good.

No. 35. *Mary C. Sanger, plaintiff, in error, v. Clark W. Upton, assignee, &c.* No. 34. *Benjamin Carver, plaintiff in error, v. Clark W. Upton, assignee, &c.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Swayne delivered the opinion of the court, affirming the judgments of the court below in these causes, with costs and interest. The substance of the opinion of these cases is that, in case of a bankrupt corporation, the district court has power to order, and the assignee of the corporation power under such order, to collect the balance unpaid upon the stock. Reported *in extenso* in Chicago L. N., December 11, 1875.

No. 275. *Jay Cooke & Co., plaintiffs in error, v. The United States.* In error to the Circuit Court of the United States for the Southern District of New York. Mr. Chief Justice Waite delivered the opinion of the court, reversing the judgment of the court below, and remanding the cause with directions to enter judgment reversing the judgment of the district court in this cause, and to direct that court to award a *venire facias de novo*. Dissenting, Clifford, Field, Bradley, JJ., Miller, J., did not sit on the argument, and took no part in the decision of this cause. This was the case of the United States against Cooke & Co. for the recovery of the price paid for the redemption of eighteen \$1,000 seven-thirty treasury notes claimed to be spurious. The decision below was that even though the firm honestly believed the notes genuine, and in good faith passed them to the assistant treasurer of the United States, and he, under the like belief, received the notes and paid for them, still the government was entitled to recover if the notes were not genuine; that even if received as genuine by the assistant treasurer, that would not bind the government if the notes were not in fact genuine; also, that the act of issuing the notes was a physical act, and, although the notes were printed from the genuine plates in the department and were all ready to issue, yet if they were not in fact issued they were not within the statute, and the government must recover. The decision here reverses the judgment and remands the cause to the circuit court, with directions to reverse the judgment of the district court and send the cause back for a new trial.

No. 32. *George W. Long et al., plaintiffs in error, v. James W. Converse et al., receiver, &c.* No. 31. *Henry N. Farwell, plaintiff in error, v. James W. Converse et al., receiver, &c.* In error to the Supreme Judicial Court of the State of Massachusetts. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writs of error in these causes for want of jurisdiction.

No. 7. Original. *Ex parte Ira G. French, petitioner.* Mr. Chief Justice Waite announced the decision of the court denying the motion for mandamus in this cause. No opinion delivered.

No. 459. *Joel C. Davis et al., plaintiffs in error, v. State of Indiana, rel. Board of Commissioners Bartholomew Co.* Mr. Chief Justice Waite announced the decision of the court, denying the motion to dismiss this cause. No opinion delivered.

No. 513. *The United States, plaintiffs in error, v. John W. Norton.* Mr. Chief Justice Waite announced the decision of the court, granting the motion to advance this cause, and assigning it for argument on the 15th of March, 1876. No opinion delivered.

Monday, December 6, 1875.

No. 45. *Sarah Ann Jackson (now Dorsey), appellant, v. Simon Jackson.* Appeal from the Supreme Court of the District of Columbia. Mr. Justice Field delivered the opinion of the court, reversing the decree of the said supreme court, with costs, so far as it awards any portion of the property in controversy to the husband, and directs a convey-



ance by the wife to him, and remanding the cause for further proceedings, in conformity with the opinion of this court. Dissenting, Davis, J. In this case the contest between the parties was in respect of certain real estate held in the wife's dower, and which she claimed as her separate estate; and the question was whether it was hers in law or belonged to the husband. The court below held that it should be divided, as being the proceeds of the joint earnings of both. It is here held that notwithstanding the fact that by the common law which prevailed in the district at the date of the marriage, the property which came by the wife became absolutely the property of the husband, still, by his assent, the wife might legally retain it; and that fifteen years of acquiescence, in this case, in the holding of the land by the wife in her own name, and in her making improvements thereon with its earnings, ought to be deemed satisfactory evidence of the husband's original authorization of the investment.

No. 48. *Gustave T. Beauregard, plaintiff in error, v. Charles Case, receiver, &c.* No. 406. *Thomas P. May, plaintiff in error, v. Charles Case, receiver, &c.* In error to the Circuit Court of the United States for the District of Louisiana. Mr. Justice Field delivered the opinion of the court affirming the judgment of the court below in these causes, with costs and interest. This was the action of Case, the Receiver of the First National Bank of New Orleans, to recover of the plaintiff in error and one Graham, operators of the New Orleans & Carrollton Railroad Company, upward of \$237,000, alleged to have been overdrawn from the bank on their account. The questions were whether there was a copartnership formed between Beauregard and the other defendants by the agreement made between them for the operation of the road, so as to make him jointly liable for the partnership debts before their advances were reimbursed; whether if a copartnership was thus created, and Beauregard became from its commencement jointly liable with the other defendants, the indebtedness of the copartnership to the bank was compensated and extinguished by the indebtedness, at the time, of the bank to May, and whether the verdict should have been against the defendants jointly for the whole sum claimed, instead of severally against each for one third of the amount as found. The court find, that there was an ordinary partnership formed under the law of Louisiana, by which Beauregard was bound, and that, under this statute, the verdict against each for his third of the debt, which still existed, was correct.

No. 49. *John Carey et al., appellants, v. Henry T. Brown.* In error to the Circuit Court of the United States for the District of Louisiana. Mr. Justice Swayne delivered the opinion of the court, affirming the judgment of the court below, with costs.

In this case it is held that where the suit is brought by the trustee to recover the trust property, or to reduce it to possession, in nowise affecting his relation with his *cestui que trust*, it is unnecessary to make the latter parties, and that this is the settled rule of equity pleading and practice. On the facts of the case it is said that the doctrine of condition precedent, contended for by the appellants, can have no application.

No. 47. *The Baltimore & Potomac Railroad Co., plaintiff in error, v. The Trustees of the Sixth Presbyterian Church.* In error to the Supreme Court of the District of Columbia. Mr. Justice Clifford delivered the opinion of the court, affirming the judgment of the said supreme court in this cause, with costs and interest. Mr. Justice Bradley did not sit on the argument and took no part in the decision.

In this case the court affirmed the judgment of the supreme court of the district in favor of the church, it appearing that the plaintiffs in error had failed to make the affidavits constituting the basis of the theory of fact involved in the errors assigned, as affecting the merits of the controversy, a part of the record, thus leaving the errors assigned without legal foundation, as held by the court, whether the inquisition to the affirmation of which the writ of error is taken was correct or not, or whether the proper evidence was allowed to go before it, was not, therefore, decided. As to the preliminary objections that the warrant for the summoning of the jury to assess the damages was not authorized by law, and that the oath required by law was not administered, the decision is also in favor of the church. The objection to the jurisdiction of the court below, because the case was not removed into that court by appeal from the special term, is held to be without merit, and the course pursued is said to be fully justified by the act of Congress.

No. 647. *Faxon D. Atherton et al., executors, plaintiffs in error, v. John Fowler et al.* No. 648. *Same v. Welcome Fowler et al.* Mr. Chief Justice Waite delivered the opinion of the court, denying the motions to dismiss.

In these causes it is held, that where the supreme court of the state reversed and

modified the judgment of an inferior court, and did not permit further proceedings in the inferior court, if the defendants consented to the modification, and the defendants did consent, the judgment was final and a writ of error, based upon it as a final judgment, will be sustained.

No. 231. *The Home Insurance Co. of New York, plaintiff in error, v. George Davis et al.* In error to the Supreme Court of the State of Michigan. Mr. Chief Justice Waite announced the decision of the court, reversing the judgment of the said supreme court, with costs, and remanding the cause with directions to reverse the judgment of the circuit court of Manistie County, and to direct that court to permit a transfer to the circuit court of the United States, upon the showing under the petition filed March 10, 1873, on the authority of *Insurance Co. v. Morse*, 20 Wall, 445. No opinion delivered.

No. 63. *Laban S. Major, plaintiff in error, v. Clark W. Upton, assignee, &c.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Chief Justice Waite announced the decision of the court, affirming the judgment of the said circuit court in this cause, with costs and interest, on the authority of *Sanger v. Upton*, decided at the present term and not yet reported. No opinion delivered.

No. 43. *The Town of Concord, plaintiff in error, v. The Portsmouth Savings Bank.* Ordered for reargument.

No. 483. *William Roemer, appellant, v. Edward Simon et al.* Mr. Chief Justice Waite announced the decision of the court, denying the motion to remand this cause. No opinion delivered.

This was a motion to remit the cause to the circuit court for a rehearing and is denied, the court holding that it is clear that, after an appeal in equity to this court, it cannot upon motion set aside a decree of the court below and grant a rehearing or modify the decree appealed from, and that upon a hearing of the cause.

## DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

### ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany N. Y., WEED, PARSONS & CO.  
 Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.  
 Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & CO.  
 Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.  
 Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.  
 Daily Reg. — *Daily Register*, New York, 303 BROADWAY, N. Y.  
 Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.  
 Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.  
 Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.  
 Leg. Gaz. — *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.  
 Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.  
 Mo. West. Jur. — *Monthly Western Jurist*, Bloomington, Ill., T. F. TIPTON.  
 N. B. R. — *National Bankruptcy Register*, New York, McDIVITT, CAMPBELL & CO.  
 Pac. Law. Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.  
 Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.  
 W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.  
 West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & CO.

AGENT. See SET-OFF.

### ALIENAGE.

"COMMON LAW JURISDICTION," as used in the acts of Congress concerning naturalization, does not mean general jurisdiction. The criminal court of St. Louis Co., Mo.,

is a court of "common law jurisdiction." *People v. McGowan*, S. C. Ill., Cent. L. J., Nov. 19, 1875; Chicago L. N., Nov. 27, 1875.

### BANKRUPTCY.

1. **APPEAL TO SUPREME COURT.**—To authorize an appeal to this court from the judgment or decree of a circuit court, reviewing the action of a district court, under its bankruptcy jurisdiction, the case must be one in which an appeal may be taken from the district to the circuit court; that is to say, it must be a case in equity arising under or authorized by the bankruptcy act. The only remedy provided for the correction of errors, in bankruptcy proceedings, is to be found in the supervisory jurisdiction of the circuit courts, under the provision of the first clause of the second section of the bankruptcy act. From the decision of the circuit court in the exercise of such jurisdiction no appeal lies to this court. *Sandusky v. First Natl. Bank*, S. C. U. S., W. L. R., Nov. 23, 1875.

2. **PROOF OF ASSIGNMENT.**—**RECORD.**—A copy of the record containing the assignment is admissible in evidence to prove the assignment, although it does not purport to be a copy of the whole record. The proceedings in bankruptcy are not deemed to constitute an integral record, but a copy of each proceeding may be authenticated as a separate record, and is competent presumptive evidence of the facts therein stated. *Michener v. Payson*, C. C. U. S. E. D. Pa., 13 N. B. R. No. 2.

3. **ACTION BY ASSIGNEE TO RECOVER UNPAID SUBSCRIPTION.**—In an action by an assignee to collect an assessment on the unpaid subscription of a stockholder, evidence of misrepresentations made at the time of the subscription to the stockholder by an agent of the corporation is not admissible. *Ib.*

4. **JUDGMENT.**—**RECORD.**—**FRAUD.**—Where the record shows that the original demand or cause of action sprung from fraud, the judgment does not merge the fraud, and is not released by a discharge. Where the record shows a material and traversable allegation of fraud as its sole foundation, the judgment need not on its face show that the demand originated in fraud. *Warner v. Cronkhite*, C. C. U. S. E. D. Wisc., *Ib.*

5. **COMPOSITION.**—**PAYMENT IN NOTES.**—A resolution of composition which provides for payment in indorsed notes is defective and will not be ratified. *In re Langdon*, D. C. U. S. Mass., *Ib.*

6. **FRAUDULENT DISPOSITION OF GOODS.**—**CONCEALING ASSETS FROM ASSIGNEE.**—It is not necessary that the goods which have been fraudulently disposed of shall have been obtained within three months prior to the commencement of the proceedings in bankruptcy, in order to convict a party of a fraudulent disposition thereof. In order to obtain a conviction for concealing assets from the assignee, it is not necessary to prove a demand on the part of the assignee. *U. S. v. Smith*, D. C. U. S. No. D. N. Y., *Ib.*

7. **COMPUTATION OF NUMBER OF CREDITORS AND VALUE OF CLAIMS.**—The debt due to a preferred creditor is not to be computed in determining whether the requisite proportion in number and value have joined in an involuntary petition. A preferred creditor cannot prove his debt until he has voluntarily or by compulsion surrendered his preference. A mere repayment to the debtor cannot take the place of a surrender to the assignee. Debts for a less sum than two hundred and fifty dollars are to be reckoned in the amount that is necessary to join in an involuntary petition. The creditors may obtain one fourth in number of the creditors whose debts exceed two hundred and fifty dollars, or one fourth of all, provided one third in amount of all the debts are represented in the petition. It is not necessary that the larger creditors shall be requested to sign the petition, and refuse. *In re Currier*, D. C. U. S. Mass., *Ib.*

8. **PRACTICE IN RESPECT OF COMPOSITION.**—**SECURED AND UNSECURED CREDITOR.**—**PARTNERSHIP.**—When a petition for composition is filed, the register will be directed to give the proper notices to the creditors. A resolution of composition must be confirmed as well as adopted by the requisite proportion. After the adoption of a resolution, a reasonable time may be given to secure such additional signatures as may be necessary to confirm it. Creditors whose debts do not exceed fifty dollars are not to be reckoned in determining the number, but are to be reckoned in determining the value. Secured creditors are to be allowed to vote as to the excess of the debt above the value of the security, in the same manner as unsecured creditors. A creditor having personal security, and not security upon the estate of the debtor, is allowed to vote as an unse-

cured creditor. Where a partnership desires a composition, the creditors may make the composition by a general vote and general confirmation, or if one of any class of creditors perceives that the other class is about to force upon him an unjust composition, he may demand a separate vote. *In re Spades, &c.*, D. C. U. S. Ind., lb.

9. POWER OF ASSIGNEE OF CORPORATION. — The assignee of a bankrupt corporation does not represent creditors so as to be able to prosecute their claims against a trustee who has rendered himself individually liable to them by making a false report. A trustee of a bankrupt corporation who has made himself individually liable to the creditors cannot be excluded from participating in the dividends until the other creditors are paid in full. *Bristol v. Sanford*, C. C. U. S. Conn., lb.

10. FRAUD. — LACHES. — CORPORATION. — Where a person was induced by the false and fraudulent representations of the directors and officers of a corporation to take stock in the corporation two years before its bankruptcy, for which he gave in payment his note secured by deed of trust on real estate, and during that period made no inquiry as to the true condition of the corporation, but suffered his note to be held out to the public as an asset of the corporation — the lapse is too long to allow the fraud to be pleaded against the creditors of the corporation, as represented by the assignee in bankruptcy, in avoidance of the obligation expressed in the note. *Farrar v. Walker*, C. C. U. S. E. D. Mo., lb.

11. SPECIAL PARTNERSHIP. — A certificate that the special partner has contributed a certain sum in cash, and a certain amount in goods, does not comply with the statutes of New York, relating to limited partnerships, and the parties may be put into bankruptcy as general partners. *In re Merrill*, C. C. U. S. No. D. N. Y., lb.

12. PETITION AGAINST CORPORATION BY SINGLE CREDITOR. — A petition to have a corporation adjudged a bankrupt may be maintained under §§ 5, 122, of the R. S. by any creditor of such corporation, and the provision of § 12 of the Act of June 22, 1874, in relation to the number and amount of the creditors required to join in such petition against a natural person, does not apply. *In re Or. &c. Co.*, Chicago L. N., Dec. 4, 1875.

### COMMON CARRIER.

CONNECTING LINES. — DELAY IN TRANSPORTATION. — RELIEF GOODS. — The plaintiff in the court below shipped, Nov. 10, 1871, four car-loads of apples at Vandalia, Mich., to agents in Minneapolis. The apples were transferred by the defendant at Chicago to the next carrier Nov. 17, and arrived at Minneapolis on Nov. 22, badly injured by frost, having been frozen after leaving Chicago on or about the 21st of November. It appeared that before the fire of October, 1871, the usual running time of freight trains between Vandalia and Chicago was twenty-four hours; that at the time this shipment was made the average running time was ten days, in consequence of the road being blocked with relief supplies for sufferers by the Chicago fire. The apples were carried in seven days. *Held*:

1. That they were transported within a reasonable time under the circumstances of the case. 2. That what would or would not constitute unreasonable delay cannot be determined by a comparison between the actual time and what had been the average running time between two given points under usual and ordinary circumstances. The proper question would be what was the average running time under the extraordinary and unusual circumstances existing at the time of the alleged delay? And, then, to ascertain whether the goods in question had been unreasonably delayed beyond such time. 3. That the company was justified in not sending forward goods in the order received, and giving relief goods the preference; that the law is not so unjust and harsh as to punish a common carrier who makes such a discrimination under the circumstances, but rather commends and approves what was done. 4. Even if there was unnecessary delay between Vandalia and Chicago, the defendant would not, by reason thereof, be liable for the injury which the apples sustained by freezing while in the custody of the next carrier. *M. C. R. R. Co. v. Burrows*, S. C. Mich., Chicago L. N., Nov. 27, 1875.

CONTRACT. See MUNICIPAL CORPORATION; TELEGRAPH COMPANY.

CORPORATION. See BANKRUPTCY, 3, 9, 10; PLEADING AND PRACTICE, 1; ULTRA VIRES.

## CRIMINAL LAW.

**KEEPING GAMBLING-HOUSE.**—“**GAMBLING**” DEFINED.—The indictment charged that the defendant “kept, used, managed, and controlled a building, erection, and place resorted to by divers persons for the purpose of gambling at games of pin-pool, cards, dice, and other games, for money, &c., . . . and then and there suffered and permitted persons to play at games of pin-pool, cards, &c., for money, beer, cigars, and other things.” The evidence showed that the defendant kept a house, as charged in the indictment, where divers persons resorted, that they were in the habit of playing at billiards and pin-pool, and that the custom and understanding with the players was that the losing party was to, and did, pay for the use of the tables, &c., the prices being twenty cents a game for billiards, and five cents a cue for pin-pool. *Held*, that this was gambling within the meaning of the statutes, and that defendant was rightly convicted of keeping a house resorted to for that purpose. *Sate v. Book*, S. C. Iowa, West. Jur., Nov. 1875.

## ESTOPPEL.

WHERE A MUNICIPAL CORPORATION takes control of a street, it is estopped to deny that such street was necessary. *City of Henderson v. Sandefor*, Ct. App. Ky., Cent. L. J., Nov. 26, 1875.

## HOMESTEAD.

1. **EQUITABLE ESTATE.**—Where a person resides upon, and occupies a certain piece of land, he may acquire a homestead interest therein, under the homestead laws of Kansas, although he may have only an equitable interest in the land. *Tarrant v. Swain*, S. C. Kans., Cent. L. J., Nov. 19, 1875.

2. **JOINT TENANCY.**—Where a person owns an undivided half of a certain piece of land, and resides upon, and occupies the land with his family, he may acquire a homestead interest in the land under the exemption laws of Kansas, so far as such interest does not conflict with the rights and privileges of his co-tenant. *Id.*

**JUDGMENT.** See **BANKRUPTCY**, 4.

**JURISDICTION.** See **ALIENAGE**.

**LACHES.** See **BANKRUPTCY**, 10.

## MASTER AND SERVANT.

**INJURY BY BELT OF FELLOW-SERVANT.**—**ENGINEER AND FIREMAN.**—A fireman employed to tend an engine fire was called upon by the engineer to assist in throwing on a belt which worked a pump used to fill the boiler. The fireman being injured by the belt, brought an action for the injury received, against the corporation which employed both the engineer and himself. *Held*, that if the fireman, although employed only for a fireman, was placed under the orders of the engineer, and was by him suddenly called upon to assist in throwing on a belt, out of his own sphere, but within the sphere of duty of the engineer, and was thus subjected to a risk with which he was not acquainted, or to a peculiar and greater risk at that time and of which he was not informed or cautioned, the defendants would be liable. *Held*, further, that if the fireman was placed under the engineer as his superior, and this superior had a right to give orders in his department, the case did not come within the principle regulating liability in cases of fellow-servants, and that the engineer must be looked upon as representing the employer. *Held*, further, that unless the plaintiff fireman had been instructed not to obey the engineer except in the line of the fireman's employment, the engineer was authorized to call upon him for assistance in any matter within the engineer's department, and the defendant would be liable, even if there was another person who might more properly be called upon. *Held*, further, that if the plaintiff fireman was instructed not to obey the engineer out of the

line of his employment, and he chose notwithstanding to obey, he could not hold the defendants liable. *Held*, further, that if the throwing on and off of the belts was not in the engineer's department, but was confined by the corporation to a belt fixer, the defendants would not be liable. *Mann v. Oriental Print Works*, S. C. R. I., Leg. Gaz., Nov. 26, 1875.

### MORTGAGE.

1. **RAILROAD MORTGAGE. — PRIORITIES. — MATERIAL-MAN.** — A mortgage executed by a railway company to a trustee, embracing all the property then owned or thereafter to be acquired by the mortgagor, for the purpose of securing bonds agreed to be issued to a contractor in part payment for the building and equipping of the company's road, takes precedence, in Iowa, of the lien of a material-man for ties furnished and used in the building of such road, after the recording of the mortgage, although such ties were furnished before the issuing of the bonds which the mortgage was intended to secure, but not until the contractor had incurred expense in carrying out his contract. *Nelson v. J. E. W. R. W. Co.*, S. C. Iowa, Cent. L. J., Nov. 12, 1875.

2. **S. C. — PURCHASERS OF RAILWAY BONDS PAYABLE TO BEARER, AND SECURED BY A MORTGAGE** which purports to be of even date with the bonds, are not bound to inquire whether the bonds were in fact executed contemporaneously with the mortgage, or whether, before the signing or negotiating of the bonds, the liens of material-men may not have attached. The material-man in such a case is affected with notice of the mortgage, by the fact of its being recorded, and stands in no better position than a second mortgagee, where the bonds secured by the first mortgage had not been negotiated until the second mortgage was executed. He should protect himself by refusing to sell his materials without payment or security. *Id.*

### MUNICIPAL CORPORATION.

**SUBSCRIPTION. — CONTRACT. — RAILROAD COMPANY.** — An act of assembly authorized the county of Alleghany to subscribe to the stock of a railroad company, paying therefor in interest-bearing bonds which the company was required to receive in cash at par. This they did, contracting to pay an annual interest thereon of six per cent. for a period of thirty-two years. The company was incorporated under the General Railroad Act of 1849, the 9th section of which provides that dividends shall in no case exceed the net profits actually acquired by the company, so that the stock shall never be impaired thereby. It appeared that the interest had been paid by the company for a number of years out of the capital of the company, and that further payments thereof would be drawn from the same source. *Held*: 1. That the company had no power to contract to pay the interest at all. 2. That the interest having to be drawn from the capital stock, disclosed a contract prohibited by the statute, and therefore could not be enforced. 3. In contracting with the county for a bonus upon its subscription, the directors were acting without authority and the company would not be bound thereby. *P. & S. R. R. Co. v. Alleghany Co.*, S. C. Pa., Leg. Gaz., Nov. 19, 1875; Leg. Int., Nov. 19, 1875.

See ESTOPPEL; NEGLIGENCE, 1, 2.

### NEGLIGENCE.

1. **MUNICIPAL CORPORATION. — STREET.** — Where a street is in an unsettled and unfrequented part of the city, and has never been improved or used as a street, it is error to instruct the jury that if the point where the accident complained of occurred was in a place designated and set apart as one of the public streets of the city, it was the duty of the city to keep the street in a condition for travel. *City of Henderson v. Sandefor*, Ct. App. Ky., Cent. L. J., Nov. 26, 1875.

2. **IBID.** — A statute of the state, enabling a city to introduce pure water, empowered the city to elect water commissioners for a fixed term, and for such subsequent terms as the city might determine, to prescribe the duties and compensation of the commissioners, and to regulate the mode and causes of their removal from office. The city owned the water-works, received rents for water, and controlled the use and distribution of the

water. In an action against the city for damages resulting from an unsafe highway, the damage being caused by a stream of water thrown from a city hydrant across the highway by the employees of the water commissioners: *Held*, that the water commissioners and their employees were the servants of the city, and that the city was responsible for their acts. *Aldrich v. Tripp*, S. C. R. I., Leg. Gaz., Nov. 12, 1875.

3. RAILWAY COMPANY. — COLLISION BETWEEN TWO TRAINS OF DIFFERENT COMPANIES. — NEGLIGENCE ON PART OF BOTH COMPANIES. — The plaintiff, a travelling inspector of the carriage department of the London & North Western Railway Company, was travelling with a free pass of that company in a train of theirs upon a journey on the defendants' line of railway, over which the London & North Western Company had running powers, and whilst so travelling the train in which the plaintiff was came into collision with a number of coal trucks of the defendants, which were being shunted on their line by their servants, and the plaintiff received bodily injuries. It was in evidence that either in consequence of the hazy state of the weather and the slippery state of the rails the driver of the plaintiff's train was unable to stop the train when he came in sight of the distance signal, which had been put at "danger" by the defendants' servants, or that he disregarded it. The jury, in an action by the plaintiff against the defendants, found that the accident was due to the joint negligence of the defendants, in shunting the trucks when a passenger train was due, and of the London & North-Western Railway Company, in their driver running past the danger signal; and it was *Held*, by Bramwell and Pollock, BB., approving of and acting on the decision in *Thorogood v. Bryan*, 8 C. B. 115; 18 L. J. 336, C. B., that the contributory negligence of the driver of the London & North Western Railway Company's train, with whom the plaintiff must, for the purpose of the action, be identified, disentitled the plaintiff to maintain an action for damages against the defendants for their negligence. *Armstrong v. L. & J. R. W. Co.* (English), Albany L. J., Nov. 27, 1875.

PARTNERSHIP. See BANKRUPTCY. 11.

### PLEADING AND PRACTICE.

1. CORPORATION. — ANSWER BY. — SEAL. — An answer by a corporation, where oath is waived, is not defective by reason of a failure to attach the corporate seal. *Laieson v. P. A. & D. R. R. Co.*, S. C. Ill., Cent. L. J., Nov. 12, 1875.

2. IN AN ACTION AGAINST A RAILROAD COMPANY FOR UNJUST DISCRIMINATION, under a statute to prevent such discrimination, it is necessary to aver the existence of a schedule and a demand and receipt of compensation in excess thereof. If the discrimination be against freights it must be alleged that the freights were of the same class as those for which a less rate was charged. *C. B. & Q. R. R. Co. v. The People*, S. C. Ill., 1b.

See BANKRUPTCY.

RAILROAD. See COMMON CARRIER; MORTGAGE; MUNICIPAL CORPORATION; NEGLIGENCE, 3; PLEADING AND PRACTICE, 2.

### SET-OFF.

IN AN ACTION BY AN AGENT FOR COMMISSIONS, the defendant may set off the losses sustained by the agent's misfeasance. *Pownall v. Bair*, S. C. Pa., Leg. Int., Nov. 5, 1875.

### TELEGRAPH COMPANY.

CONTRACT TO FURNISH MARKET REPORTS. — DUTY AND LIABILITY OF COMPANY. — DAMAGES. — Where a telegraph company is charged with sending a market report incorrectly, it will be presumed, in the absence of any evidence upon the subject, that the reports were correctly received by the company. If the company undertakes, without restriction upon its liability, to transmit such reports, the burden rests upon it to show that a mistake in the transmission occurred for reasons which would relieve it of

liability. If it contracts to send market reports to be obtained by its agents, it undertakes to procure and send correct reports.

Where a telegraph company, under a contract to furnish market reports, advised plaintiff that wheat was worth \$1.21½, whereupon plaintiff advised the purchase of 5,000 bushels, and his agents paid therefor \$1.50, which was the actual price, the court allowed damages at the rate of 28½ cents per bushel: *Held*, that the sum was not beyond the amount plaintiff was entitled to recover.

A telegraph company contracting to furnish Chicago market reports to a wheat buyer in Iowa, is liable for damages resulting from the purchase of wheat by the dealer, in Chicago, without notice that it was his intention to make such purchase. *Turner v. Hawkeye Tel. Co.*, S. C. Iowa, West. Jur., Nov. 1875.

### ULTRA VIRES.

**BANKING. — ATTACHMENT. — CONTRACT.** — Plaintiff caused an attachment to be levied upon the cattle of a debtor, and subsequently agreed to permit him to drive them to the Indian Territory, the plaintiff assuming the risk of any other creditor attaching the cattle, before they should arrive at their destination, not later than November 27; in consideration of which the debtor executed, with others, a note, which, together with a sum of money, he deposited with the defendant bank, subject to the condition that if the cattle should be attached before they reached the Indian country, by other creditors of the debtor, and before November 27, then the note and money were to be handed back to Johnson, one of the makers. If, however, the cattle were not so attached, then the note and money were to be delivered to the plaintiff. A sham attachment was sued out and levied on the cattle while *en route* for the Indian country; and thereupon the cashier of the defendant bank was induced to deliver the note and money to Johnson. *Held*, that the cashier acted in a position analogous to that of a stake-holder; that in so doing he was not acting within the scope of his implied authority; that the bank could not legally undertake such a transaction; it was *ultra vires*, and therefore the bank was not bound. *First Nat. Bank v. Citizens' Bank*, C. C. U. S. Kans., Cent. L. J. Nov. 19, 1875.

### WARRANTY.

**IN THE ABSENCE OF ANY FRAUD OR DECEIT IN THE SALE OR WARRANTY OF A HORSE**, or of an agreement to return, the purchaser has no right to rescind the contract return the animal, and demand the price, without the defendant's consent. In such case, his only remedy after the contract is executed is by action on the warranty, — the measure of damages being the difference between the actual value of the animal and the sound value, with interest from the date of sale. *Freyman v. Knecht*, S. C. Pa., Leg. Gaz., Nov. 12, 1875.

### WILL.

**1. CONSTRUCTION. — TRUSTS.** — Where a testator directed in his will his estate to be divided immediately after his death into four equal parts, — one part to be allotted to his son; one part to the children of his son; and in regard to the other parts, one each to his two daughters respectively; the latter shares to be held by his trustees for the separate use of such daughters free from their husbands, and if either of said daughters dies without issue, their said fourth parts are also devised to the said children of his son, share and share alike, and where the trustees had power to sell, subject to the aforesaid trusts: It was *held*, that after the death of the son and of both daughters without issue, the estate never having been divided, the trusts became extinguished, and the estate vested in the children of the son, and that consequently the surviving trustee had no power to sell and convey any part of the real estate. *Bradley v. Young*, S. C. D. C., W. L. R., Nov. 16, 1875.

**2. IF TWO CLAUSES IN A WILL ARE IRRECONCILABLE**, the latter is to be adopted as the latest expression of the testator's mind, but this is not to be done if it be possible to give effect to both consistently with the main design of the testator. *Snivelyn's Ex. v. Stover*, S. C. Pa., Leg. Int., Nov. 26, 1875.



## SUPREME COURT OF THE UNITED STATES

[OCTOBER TERM, 1875.]

INVESTMENT OF TRUST FUNDS IN CONFEDERATE BONDS. — *Horn v. Lockhart distinguished.*

## KNOTTS v. STEARNS.

FIELD, J. . . . The decree, after ordering a sale of the property, also provided for the investment of the proceeds in bonds or stocks of the Confederate States, or of any state belonging to the Confederacy, or of the city of Richmond. The proceeds were invested in bonds of the Confederacy, and the investment was approved by the court. It is now contended that the decree of sale was invalid because of the direction for the investment of the proceeds, and the subsequent approval of the investment made, the counsel of the appellants insisting that aid was thus directly given to the rebellion. . . .

The case of *Horn v. Lockhart*, 17 Wallace, 570, which is invoked by the appellants, lends no support to their pretensions. That was the case of an executor in Alabama seeking to escape an accounting and payment to legatees of proceeds of property of the estate in his hands sold previous to the war, and retained by him for years after he had been called to a final account by the probate court of the state, by alleging a voluntary investment of the proceeds in bonds of the Confederate government. Those bonds were issued for the express purpose of raising funds to carry on the war then waged against the United States. The investment was, therefore, held to be illegal, because it constituted a direct contribution to the resources of the Confederate government, thus giving aid and comfort to the enemies of the United States; and the character of the transaction in this respect was not deemed to have been changed by the fact that the investment was authorized by the existing legislation of the state, and was approved by the subsequent decree of its probate court. A voluntary proceeding in aid of a treasonable organization could not be thus freed from its original unlawfulness.

There is no analogy between that case and the one at bar. Here no action is sought to be upheld which was taken in aid of the insurrectionary government. The sale in question was not made with any reference to that government, but solely to raise a fund which would yield an income for the support of the widow and children, and was, therefore, a lawful proceeding.

The widow and the guardian were not compelled to take the bonds of the Confederate government; they were allowed the option of investing in such bonds, or bonds of any of the states of the Confederacy, or bonds of the city of Richmond. Having deliberately selected the securities of the insurrectionary government in which to place their money, it would be a strange thing if complaints could now be heard from them against the title of the purchaser of the property, who had nothing to do with the disposition of the money, on the ground that the court did not preserve them from the folly of that investment.

We perceive no error in the decree of the court below, and it is accordingly affirmed.

## NOTES OF NEW BOOKS.

CASES ARGUED AND DETERMINED IN THE CIRCUIT COURTS OF THE U. S. FOR THE FIFTH JUDICIAL CIRCUIT. Reported by William B. Woods, the Circuit Judge. Chicago: Callaghan & Co.

With the growth of litigation in the federal courts have come new series of United States Courts reports. We venture nothing in expressing the conviction that they have generally been timely and useful additions to our legal literature, particularly where, as in the present instance, they have tended to define and harmonize the practice of an entire circuit.

The volume before us merits special notice as containing numerous opinions having relation to the great questions that were incidental to the rebellion and an exceptional number of decisions upon federal practice. These are, probably, its most pronounced features, although it is in no sense wanting in interest in other respects. Its merit is enhanced by the fact that the cases are to be regarded as really "selected," and as marked precedents covering a very wide range. As a whole, we know of no more comprehensive volume of federal reports.

The opinions are chiefly by Judges Bradley and Woods. In nearly every instance the facts are stated by the court without any explanation of the points of counsel—a circumstance which we are inclined to regret, especially in view of the masterly ability of the bars of several of the districts in the Fifth Circuit, whose representatives appear only by name.

The series is happily inaugurated by the Circuit Judge, and will be gratefully accepted by the profession in his circuit as another evidence of his industry and ability in the performance of the grave and delicate duties that have devolved upon him.

**THE LAW OF HOMESTEAD AND EXEMPTIONS.** San Francisco: Sumner Whitney & Co. A convenient and conscientious work, prepared with much judgment and satisfactorily exhaustive.

**CASES ON WARRANTY.** Cleveland: Ingham, Clarke & Co. This collection embraces the English and American cases, the most important *in extenso*. It is not without some merit. The mechanical features of the work are bad enough to call for remark.

**AUSTIN'S JURISPRUDENCE** is offered by Messrs. Cockroft & Co. of Chicago. The same firm have *Forsyth's History of Trial by Jury*.

**JUDGE COOLEY'S WORK ON TAXATION** is ready for delivery. Callaghan & Co, Chicago, publishers.

**LITTLE, BROWN, & COMPANY** have published a treatise on the *Law of Taxation*, by Francis Hilliard; also Vol. II. of *Bishop's Commentaries on the Law of Married Women*.

# THE AMERICAN LAW TIMES.

NEW SERIES. — FEBRUARY, 1876. — VOL. III., No. 2.

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## NOTES OF OPINIONS, DECISIONS, AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1875.

Monday, December 15, 1875.

No. 52. *R. K. Sewall, administrator, &c., appellant, v. J. W. Jones et al.* Appeal from the Circuit Court of the United States for the District of Maine. Mr. Justice Hunt delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause, with directions to enter a decree in favor of the defendant. Dissenting, Mr. Justice Clifford. This was an action to recover for the infringement of a patent for preserving corn, originally granted to one Isaac Winslow, of which Jones is the assignee. It is here held that the Winslow patent had been anticipated in its substantial merits by a patent to one Durand, granted in 1810, and that it is therefore void for want of novelty. It having been alleged that Winslow was not the original discoverer of the process claimed by him, but that he learned it in France, the court say on this head that it is a settled principle of patent law that, to entitle a plaintiff to recover for violation of a patent, he must be the original inventor, not only as regards the United States, but as to other parts of the world. Even if the plaintiff did not know that the discovery had been before made, still he cannot recover, if it has been in use, as described in public prints. Reversed.

No. 3 (original). *The State of Florida, complainant, v. E. C. Anderson et al.* Mr. Justice Bradley delivered the opinion of the court, ordering decree and perpetual injunction against the defendants. This is a suit by the state to enforce its lien upon the Jacksonville, Pensacola, & Mobile Railroad, under a mortgage made in 1870, in exchange for state bonds issued in aid of the road. By this exchange the state took \$3,000,000 of the first mortgage bonds of the road, and \$1,000,000 of the bonds of the Florida Central Railroad Company, in consideration of its issue to the company of \$4,000,000 of bonds to hasten the completion of certain roads which had been consolidated in pursuance of the act incorporating it and authorizing the aid. The interest on these bonds not being paid, and a balance remaining due on a trustee's sale made in the interest of the state to the companies of certain of the roads consolidated, this suit was brought, and the decision is that the defendants ought to be enjoined from selling, taking possession of, or interfering with the line of railroad extending from Lake City to the Chattahoochee River, and from Tallahassee to St. Marks, so as to impede or obstruct the state in taking possession and procuring it to be condemned and sold in payment of the purchase money and interest claimed. The receiver of the property heretofore appointed is continued until the property can be delivered up to the proper authority.

No. 42. *J. Sherman Hall et al., plaintiffs in error, v. R. A. Lanning et al.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Bradley delivered the opinion of the court, reversing the judgment of the said circuit

court, with costs, and remanding the cause, with directions to award a *venire facias de novo*. Dissenting, Mr. Chief Justice Waite, Mr. Justice Strong, and Mr. Justice Hunt. This was an action of debt brought on a judgment rendered in New York against the plaintiffs in error as partners. Lybrand questioned the judgment, alleging that he had not been served with process, and did not appear, and that he was not a partner with Hall at the date of the judgment, and had not been for more than six months before. The decision below was that the judgment was conclusive against Lybrand, notwithstanding his plea and his non-residence in New York. It is here held that after the dissolution of a copartnership, one of the partners, in a suit brought against the firm, has no authority to enter an appearance for other partners living out of the state, and who have not been served with process, and that a judgment against all partners founded on such an appearance may be questioned by those not served with process in a suit brought thereon in another state, and will not bind them.

No. 44. *The Phillips & Colby Construction Co., plaintiff in error, v. Mark T. Seymour et al.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Miller delivered the opinion of the court, reversing the judgment of the said circuit court, with costs, and remanding the cause for further proceedings, in conformity with the opinion of this court. In this case, Seymour & Co. obtained a judgment against the Construction Company of the Wisconsin Central Railroad Company for a breach of the contract under which Seymour & Co. were building sections of the road. It was here insisted that the court erred in permitting a recovery beyond the amount earned by the work done, inasmuch as the alleged insolvency of the Construction Company, or failure to pay, had been brought about by the failure of Seymour & Co. to complete certain portions of the road, covered by their contract, as early as stipulated; that a recovery for prospective profits in case of the successful completion of the entire route given to the contractors, either by themselves or others, as sub-contractors, should not be allowed, because the damages were too remote. The court sustained this view, and reversed the judgment as to such special damages.

No. 58. *Ira P. Nudd et al., plaintiffs in error, v. George B. Burrows, assignee.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Swayne delivered the opinion of the court, affirming the judgment of the said circuit court in this cause, with costs and interest. This was an action by the defendant, here assignee in the bankruptcy of one Emmons, to recover certain money and property received of the bankrupt by the plaintiffs in error. The claim was that the property received was stock, bought largely on credit, at a time when Emmons was hopelessly insolvent, and that this fact was at the time known to the defendants, and that the transaction amounted to a fraudulent preference of creditors. The court below found the allegation true, having admitted as evidence the declarations of Emmons concerning the purchase of the stock, and the payment to the plaintiffs in error, notwithstanding the declarations were not made in the presence of either of them or brought to their knowledge. The court here affirms the judgment, sustaining the theory of the assignee that the evidence was competent, being the declarations of a fellow-conspirator.

No. 57. *The First Unitarian Society of Chicago, plaintiff in error, v. H. Floyd Faulkner et al.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Clifford delivered the opinion of the court, affirming the judgment of the said circuit court in this cause, with costs and interest. This was an action by the architects to recover of the society for plans for a church edifice. The defence was that the plans were to be for such an edifice as could be built for a certain sum, whereas the lowest bid received was for upward of \$20,000 more than that specified. The court below admitted evidence of certain utterances of the pastor of the church, which was favorable to the architects, and the verdict was for them. The judgment entered upon the verdict is here affirmed, the court being of the opinion, upon the whole case, that the recovery was reasonable.

No. 21. *George C. Roberts, appellant, v. William F. Ryer.* Appeal from the Circuit Court of the United States for the Southern District of New York; and No. 46. *George C. Roberts, appellant, v. Joseph Buck, Jr.* Appeal from the Circuit Court of the United States for the District of Massachusetts. Mr. Chief Justice Waite delivered the opinion of the court, affirming the decrees of the said circuit courts in these causes, with costs. This was a suit for the infringement of a patent for an improvement in refrigerators. The decision below dismissed the bill, holding that the patent was void for want of novelty, and that decree is here affirmed.

No. 46. *Roberts v. Buck.* Same court; same decision.

No. 75. *James H. Woodford et al., plaintiffs in error, v. The Canastota National Bank.* In error to the Circuit Court of the United States for the Northern District of New York. Mr. Chief Justice Waite announced the decision of the court, affirming the judgment of the said circuit court in this cause, with costs and interest, on authority of *Kennedy v. Gibson*, 8 Wall. 498, and *Farmers' & Mechanics' National Bank of Buffalo v. Dearing*, decided at the present term. (See Am. L. T. for Jan. 1876, p. 2.) No opinion delivered.

No. 50. *Isaac N. Bressler, plaintiff in error, v. Nelson Maxson et al.* In error to the Supreme Court of the State of Illinois. Mr. Chief Justice Waite announced the decision of the court, dismissing the writ of error in this cause for the want of jurisdiction, on authority of *St. Clair v. Lovington*, 18 Wall. 628, and *Moore v. Robbins*, 18 Wall. 588. No opinion delivered.

No. 759. *The County of Warren, plaintiff in error, v. George O. Marcy.* No. 760. *The County of Warren, plaintiff in error, v. Augustus T. Post.* No. 761. *The County of Warren, plaintiff in error, v. The Portsmouth Savings Bank.* Mr. Chief Justice Waite announced the decision of the court, denying the motions to dismiss these causes. No opinion delivered.

Monday, January 10.

No. 66. *August F. Ludwig et al., appellants, v. The Propeller Free State, &c.* Appeal from the Circuit Court of the United States for the Eastern District of Michigan. Mr. Justice Hunt delivered the opinion of the court, affirming the decree of the said circuit court with costs. In this case the court affirmed the decrees below, holding that in a case of collision on the Detroit River between the propeller and a scow owned by the appellants, the scow was at fault in changing her direction after, by certain manœuvres, she had induced the propeller to believe she would hold her course, and under the circumstances of the case the propeller was not charged with the duty of slackening her speed, because, in the opinion of her master, formed in view of the movements of the scow, there was no danger of a collision.

No. 80. *Henry M. Nebbett, appellant, v. James E. McFarland.* Appeal from the Circuit Court of the United States for the District of Louisiana. Mr. Justice Hunt delivered the opinion of the court, affirming the decree of the said circuit court, with costs.

No. 94. *Mutual Benefit Life Insurance Company, plaintiff in error, v. Hattie B. Tisdale.* In error to the Circuit Court of the United States for the District of Iowa. Mr. Justice Hunt delivered the opinion of the court, reversing the judgment of the said circuit court, with costs, remanding the cause, with directions to award a new trial. This was an action by the wife to recover upon a policy of insurance on the life of her husband. There was some evidence to the effect that he had been seen alive subsequent to his reported death. The court ruled that the letters of administration issued upon the estate of the husband to the wife made such a *prima facie* case of death as cast the burden of proof upon the company. From this decision the case came here, where the question is whether in such a case, where the right of action depends upon the death of the insured, letters of administration upon the estate of such person, issued by the proper probate court, afford legal evidence of his death. It is here held that upon all the authorities, and upon a full consideration of the theories of the text writers on evidence, which are very conflicting, such letters are not sufficient proof of death, and the judgment is reversed.

No. 62. *Richard L. Wallach et al., appellants, v. John Van Riswick.* Appeal from the Supreme Court of the District of Columbia. Mr. Justice Strong delivered the opinion of the court, reversing the decree of the said supreme court, with costs, and remanding the cause for further proceedings, in conformity with the opinion of this court. Charles S. Wallach, a brother of ex-mayor Wallach, of Washington, was an officer of the Confederate army during the war, and while thus engaged his real estate in Washington was confiscated, Van Riswick becoming the purchaser at the sale. At the date of the confiscation there was an incumbrance on the property for \$5,000, which was held by Van Riswick. After the war Wallach returned to the city, and his wife joined him in a deed of the property to Van Riswick, the consideration being a considerable sum. Upon the death of Wallach his children brought this action, claiming that after confiscation no title remained in their father to convey, and that therefore nothing was passed by the deed to Van Riswick, and they, as his heirs, had a right to redeem. To this bill the court below sustained a demurrer, and the cause came here, where it is held that the obvious meaning of the legislation on the subject is that the proceedings for confiscation and sale shall not affect the owners of the property after the termination of the offender's natural life; that after his death, the land shall pass to or be owned by the heirs as if it had not

been forfeited, and that the forfeiture is complete while it lasts, leaving no estate in the offender. Nor, it is said, could a pardon to Wallach operate to restore what the United States has ceased to hold. It could not give back the property which had been sold, or any interest in it, either in possession or reversion. Hence the deed to Van Riswick passed no title, and at the death of Wallach the estate vested in his heirs.

No. 634. *Desire A. Chaffraiz, appellant, v. Arthur Shiff*. Appeal from the Circuit Court of the United States for the District of Louisiana. Mr. Justice Strong delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause, with directions to dismiss the complainant's bill. This was a bill for specific performance. The contract was for the sale of real estate, and expressly stipulated that the purchaser should not be bound to accept the sale if the titles were not valid. The title offered was that of a purchaser at a confiscation sale. The person as whose property the land was confiscated had released without warranty. *Held*, on the authority of *Wallach v. Van Riswick*, decided to-day, that such a title is not a complete and valid one; that it is ineffective beyond the life of the offender, and that his release did not enlarge it.

No. 69. *The Twin Lick Oil Company, appellants, v. William Marbury*. Appeal from the Supreme Court of the District of Columbia. Mr. Justice Miller delivered the opinion of the court, affirming the decree of the said supreme court in this cause, with costs. This is an affirmance of a decree below dismissing the bill of the oil company, which sought to come in and share with Marbury the profits of certain oil property in West Virginia, which had been abandoned by the company, and had come into the possession of Marbury by way of security for advances made to the company, and which by his enterprise was subsequently made valuable. As the company shared no part of the disbursements which led to the appreciation of the property, and if the enterprise had been a failure would have declined to share any of the losses, it is held there is no equity in the bill.

No. 82. *Gilbert Woodruff et al., plaintiffs in error, v. Benjamin F. Hough et al.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Miller delivered the opinion of the court, affirming the judgment of the said circuit court with costs and interest. This was the affirmance of a judgment in favor of the defendants in error on a contract with one Allen to furnish all the wrought iron required for the construction of a jail which Allen had contracted to build for the county of Winnebago. The judgment was against the plaintiffs in error, as sureties on Allen's contract, for damages occasioned by a refusal to accept the iron furnished, and errors were assigned to the rulings on the trial. The court here says that if there was an error it was on the part of the jury and not of the court, and that it will not retire the case for the parties on the charge of the court and the evidence set out in the bill of particulars.

No. 588. *The United States, appellants, v. Archibald McKee et al.* Appeal from the Court of Claims. Mr. Justice Miller delivered the opinion of the court, affirming the judgment of the said Court of Claims in this cause. Dissenting: Mr. Justice Clifford and Mr. Justice Hunt. Mr. Justice Davis did not sit on the argument, and took no part in the decision of this cause. This was the claim of the heirs and legal representatives of Col. Francis Vigo, late of Terre Haute, Indiana, for money and supplies furnished the troops under General Clarke, during the Revolutionary War. The original claim was upon a draft for \$8,616, drawn by General Clarke in favor of Colonel Vigo, Dec. 4, 1799, upon the agent of the State of Virginia. The judgment below was for the amount of the draft, with interest from March 20, 1779, to January 18, 1875, making a total of \$49,898.60, the interest amounting to nearly five times the amount of the draft. The court affirm the judgment, regarding the claim as liquidated, and only wanting a decision upon its validity. Mr. Justice Miller delivered the opinion. Justices Clifford and Hunt dissented as to the interest allowed, on the ground that in cases of such old claims, which have been deferred by the accounting officers of the treasury awaiting further legislation, interest should not be allowed unless the new law clearly provides for its payment. Mr. Justice Davis did not sit in the case.

No. 59. *Narah McMurray et al., appellants, v. Austin P. Brown*. Appeal from the Supreme Court of the District of Columbia. Mr. Justice Clifford delivered the opinion of the court affirming the decree of the said supreme court in this cause, with costs. This was the affirmance of a decree enforcing a lien for materials furnished by Brown for the erection of two houses for the plaintiff in error. Mr. Justice Clifford delivered the opinion.

No. 79. *John Miner, appellant, v. Thomas Pitts, executor, &c.* Appeal from the Circuit Court of the United States for the Eastern District of Michigan. Mr. Justice Clifford delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause, with directions to enter a decree affirming the decree of the district court. This was a case of collision on Lake Huron, between the steam tug William Goodwin, owned by Miner, and the bark. The tug was at rest, awaiting a tow. Her lights were seen by the bark when the two vessels were a mile or two apart, and the district court held both vessels to be at fault and divided the damages. The circuit court reversed the decision, taking the view that the bark, after discovering the tug, was entitled to proceed upon the theory that she could keep out of the way, as required by law of steam vessels. It is here held that all the facts in the case are conclusive that the bark did not keep her course, and that she had no right to treat the tug as an obstruction to navigation and run her down, without showing clearly her own care and caution in attempt to avoid a collision. Reversed with directions to affirm the decree of the district court. Mr. Justice Clifford delivered the opinion.

No. 85. *The New Lamp Chimney Company, plaintiff in error, v. The Ansonia Brass & Copper Company.* In error to the Supreme Court of the State of New York. Mr. Justice Clifford delivered the opinion of the court, affirming the judgment of the said supreme court, with costs. This was an affirmance of the judgment of the state court holding that a decree of a court in bankruptcy, adjudging the defendant corporation a bankrupt, and the subsequent proceedings in pursuance thereof, did not have the effect to discharge the corporation from the claims in suit beyond the amount paid thereon to the plaintiffs as dividends, even though the claim was proved by the plaintiffs in the bankrupt proceedings.

No. 93. *Marie A. N. Pollard, plaintiff in error, v. Jacob Lyon.* In error to the Supreme Court of the District of Columbia. Mr. Justice Clifford delivered the opinion of the court, affirming the judgment of the said supreme court in this cause, with costs. In this case Mr. Lyon said of Mrs. Pollard, that he had seen her in bed with one Denty, and Mrs. Pollard recovered damages for injury to her name and fame. The general term reversed the judgment, holding that she could not recover without alleging and proving any special damage resulting in the use of the language. That judgment is here affirmed, the court holding that in such a case it is necessary that the declaration should set forth precisely in what way the special damage resulted from the speaking of the words; that it is not sufficient to allege generally that the plaintiff has suffered special damage, or that the party has been put to great costs, &c.

No. 60. *John H. Kennard, plaintiff in error, v. The State of Louisiana ex rel. P. H. Morgan.* In error to the Supreme Court of the State of Louisiana. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgment of the said supreme court in this cause, with costs. This is the contest between Kennard and Morgan for the position of justice of the supreme court of that state. This court affirms the judgment of the state court as against Kennard, holding that the proceedings were regular, and sufficient and conclusive of the questions involved.

No. 76. *John W. Butterfield, appellant, v. George Usher.* Appeal from the Supreme Court of the District of Columbia. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the appeal in this cause for the want of jurisdiction. This case was an appeal from a decree of the supreme court of the District of Columbia setting aside a former decree of sale of lands belonging to Usher, and which were purchased by Butterfield, who obtained a deed for the property, said sale being confirmed and the deed approved by the court. The decree appealed from was entered on an offer of the defendant Usher, making an advance on the former sale, and the trustee was ordered to advertise and resell the property; to return to Butterfield the amount of the purchase money, together with interest at ten per cent. per annum, and that in reselling the property he (the trustee) should put it up at a price not lower than that realized at the former sale together with the advance offered. Held, that this is not a final decree as it merely disposes of a motion, not the case itself, and as this court cannot take jurisdiction except on a final decree, that the appeal in this case must be dismissed for the want of jurisdiction.

No. 496. *Samuel Black et al., appellants, v. The United States.* Appeal from the Court of Claims. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgment of the said court of claims in this cause. This was an affirmance of a judgment for supplies furnished the army in Dakota, during the war.

No. 98. *Reuben Wright, plaintiff in error, v. Jonas M. Tebbets.* In error to the Supreme Court of the District of Columbia. Mr. Chief Justice Waite delivered the opinion of

the court, affirming the judgment of the said supreme court in this cause, with costs and interest. This was an action by Tebbets to recover for services rendered Wright in the matter of his claim for damages suffered in the Choctaw Country during the war, prosecuted before the Southern Claims Commission. The contract was for one tenth of the amount received. The court below held that the services were legitimate and gave judgment for the attorney. The judgment is here affirmed, the court finding nothing in the contract against public policy or tainted with champerty.

No. 97. *John Muller and John Zimmer, plaintiffs in error, v. Louis Ehlers.* In error to the Circuit Court of the United States for the Eastern District of Wisconsin. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgment of the said circuit court in this cause, with costs. This case presents the question, whether a bill of exceptions, signed and filed by order of the court *nunc pro tunc*, after the writ of error had been perfected and after the adjournment for the term at which the judgment was entered, can be considered a part of the record. *Held*, that the power to reduce exceptions, taken at the trial, to form, and to have them signed and filed, is, under ordinary circumstances, confined to a time not later than the end of the term at which the judgment was rendered. This is considered the true rule, and no exceptions should be allowed without an express order of court made during the term or consent of the parties, save under very extraordinary circumstances.

No. 89. *Charles Watts, plaintiff in error, v. The Territory of Washington.* In error to the Supreme Court of the Territory of Washington. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writ of error in this cause for the want of jurisdiction. This was a criminal case brought up by writ of error to the supreme court of the Territory of Washington. *Held*, that no question is presented by the record of which this court can take jurisdiction, as it nowhere appears that the Constitution, or any statute or treaty of the United States, was in any manner drawn in question.

No. 70. *David H. Mitchell, plaintiff in error, v. The Board of County Commissioners of Leavenworth, Kansas, et al.* In error to the Supreme Court of the State of Kansas. Mr. Chief Justice Waite announced the decision of the court, affirming the decree of the said supreme court in this cause, with costs. In this case Mr. Mitchell sought to restrain the board from taxing government securities held by him, the tax officers having insisted upon the levy because the securities had been purchased the day before the meeting of the board, to avoid, as alleged, the imposition of the tax, and to evade taxation by the state altogether. The court refused to interfere to assist the complainant in a scheme to avoid taxation, and that decision is here maintained, the court remarking that a court of equity will not interpose to aid the plaintiff in an effort to escape his proper proportion of the burden of taxation. The securities are not taxable by the state, it is true, but if the plaintiff has any remedy it is at law.

## DIGEST OF CASES

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### ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany N. Y., WEED, PARSONS, & CO.  
 Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.  
 Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & CO.  
 Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS, & WENTWORTH.  
 Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.  
 Daily Reg. — *Daily Register*, New York, 303 BROADWAY, N. Y.  
 Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.  
 Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.  
 Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.  
 Leg. Gaz. — *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.  
 Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.  
 Mo. West. Jur. — *Monthly Western Jurist*, Bloomington, Ill., T. F. TIPTON.  
 N. B. R. — *National Bankruptcy Register*, New York, McDIVITT, CAMPBELL, & CO.



Pac. Law. Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.  
 Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.  
 W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.  
 West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & CO.

## BANKING.

See BILLS AND NOTES, 3.

## BANKRUPTCY.

1. THE COMMON LAW RELATING TO ASSIGNMENT for the benefit of creditors is not a part of the state insolvent law, and is not suspended by the bankrupt law. *Cook v. Rogers*, S. C. Mich., 13 N. B. R. Nos. 3 and 4.

2. ASSIGNMENT. — JUDGMENT CREDITOR. — ATTACHMENT. — An assignment for the benefit of creditors is valid as against a judgment creditor who lays an attachment in the hands of the trustee, for it is not absolutely void. *Ib.*

3. EXECUTION. — JUDGMENT CREDITOR. — DILIGENCE. — A creditor may reduce his demand within the jurisdiction of a magistrate, take a judgment, by default therefor, and obtain a priority by an execution issued thereon. Where the law allows a judgment creditor to issue an execution immediately, when it shall be made to appear that delay will endanger the collection of the judgment, he may do so, and obtain a priority thereby. The fact that the affidavit was filed, and execution issued and levied, on the same day on which the proceedings in bankruptcy were commenced, does not prove collusion. *Wilt v. Hereth*, D. C. U. S. Ind., *Ib.*

4. PRACTICE. — BILL OF REVIEW. — A bill of review may be treated as a petition for review. *Hurst v. Teft*, C. C. U. S. No. D. N. Y., *Ib.*

5. SUMMARY PETITION. — BILLS AND NOTES. — SUMMARY ORDER. — Where the assignee denies the validity of a claim and asserts title to the property, the claimant cannot proceed by a summary petition. If the bankrupt received property as security for indorsements and notes made by him for the accommodation of the owner, the holder of one of these notes is not entitled to a summary order directing the payment of his claim out of the property. *Ib.*

6. NEW PETITION. — WHERE NEW DEBTS HAVE BEEN CONTRACTED by a voluntary bankrupt since the filing of his petition, a new petition may be filed. *In re Drisco*,<sup>1</sup> D. C. U. S. Mass., *Ib.*

<sup>1</sup> In this case Judge LOWELL writes: "It was twice decided in Massachusetts, that when a discharge had been refused to a bankrupt or insolvent, he might yet apply again for the benefit of the statute, if he had contracted new debts sufficient in amount to give the court jurisdiction. *Fisher v. Carrier*, 48 Mass. 424; *Gilbert v. Hebard*, 49 *Ib.* 129.

In the former of these cases, the arguments on the one side and the other were given by SHAW, C. J., with his accustomed thoroughness, and the conclusion reached was, that the policy of the law would be best subserved, and its true intent be met, by distributing newly acquired assets equally among the new creditors, and such of the old creditors as choose to come in, and by permitting a discharge from the new debts. It was taken for granted, that the decree of discharge could not operate upon debts which were proved or provable under the earlier bankruptcy, because as to those it was *res judicata*, that the bankrupt was not entitled to it; and it was said that the discharge in the new proceedings must be limited in terms to the new debts, unless the old creditors, or some of them, elected to come in and share in the new assets. The reasoning of the chief justice, and the decisions in these cases, have proved satisfactory to the profession, I believe; and they are entirely so to my mind. But there have been cited here some provisions of the bankrupt act, and some recent decisions in England, which are relied on to countervail the older arguments and decisions."

Having pointed out the differences between the English and American systems, the learned judge continues his opinion as follows: —

"It will be seen at a glance, that our law is much more favorable to the debtor, and encourages proceedings by him for his own benefit as well as for the distribution of his property; and his future earnings and acquisitions are his own from the time of the filing of the petition.

"Examined in the light of these marked differences between the English statute and ours, the cases cited will be found to support rather than to shake the conclusions to which I have come.

"Under the statute of 1869, the debtor may propose a liquidation by arrangement, which has many of the features of our voluntary bankruptcy, but leaves more power with the creditors, and is not bankruptcy, unless the creditors choose. But so far as the provision goes it resembles bankruptcy; and if the liquidation is not closed, the property will all belong to the trustee, whether newly acquired or not, unless the creditors vote a discharge. Under the law it was held, in the cases cited, that while one composition remained unsatisfied, a new one could not be upheld, even though it brought in new creditors or new property, unless this new property had been released by the old creditors, and in that case it might be the subject of a new arrangement.

"Now, our statute itself releases after acquired property from the operation of the old proceedings. When, therefore, the cases cited decide that newly acquired property, which is not subject to the old liquidation, may be the subject of a new one, they decide the point in the same way, *mutatis mutandis*, as the courts of Massachusetts decided it." — EDITOR.

7. JURISDICTION. — STATE COURT. — CORPORATION. — The fact that a state court had, prior to the filing of the petition, acquired jurisdiction over a corporation in a suit commenced therein for the purpose of distributing its estate as an insolvent corporation, and a receiver appointed therein, is no ground for dismissing a petition for an adjudication of bankruptcy filed against it. *In re G. P. R. R. Co.*, D. C. U. S. N. J., *Ib.*

8. COMPOSITION. — PAYMENT IN INSTALMENTS. — OMISSION OF ASSETS FROM STATEMENT BY MISTAKE. — A resolution of composition may provide for payment in instalments, the postponed payments to be secured by indorsed notes. The debtor is not discharged under a composition until the whole amount of the notes given to secure the deferred instalments are paid. Where there is no fraud or concealment, the omission to place an asset in the statement is no ground for refusing to confirm it if the creditors are fully informed concerning it, and its value does not reasonably require an alteration of the terms of the composition. The testimony of the debtor given at the meeting constitutes a part of his statement. *In re Reiman*, C. C. U. S. So. D. N. Y., *Ib.*

9. A STATE LAW TO PREVENT FRAUDULENT ASSIGNMENTS is not an insolvent law, and is not necessarily superseded by the statute of the United States concerning bankruptcy. *Ebersole v. Adams*, Ct. App. Ky., *Ib.*

10. WITHDRAWAL OF CREDITOR. — Where creditors in good faith join in petition in bankruptcy, they cannot afterwards withdraw so as to leave a less number and amount of the creditors than is required by law, and deprive the court of jurisdiction as to the matter of adjudication; but where assent to join in the petition is obtained by misrepresentation or misunderstanding by the creditor, upon the same being shown to the court, such creditor will be allowed to withdraw at any time before adjudication. *In re Sargent*, D. C. U. S. No. D. Ohio, *Ib.*

11. THE AFFIDAVIT TO THE PETITION BRING DEFECTIVE IN FORM, it may, on motion, be amended so as to conform to law. *Ib.*

12. OBJECTION TO AMENDMENT. — A CREDITOR who has in good faith joined in the petition cannot afterwards object to amendments thereof which appear necessary to the prosecution of the same to final effect. *Ib.*

13. WHERE AN ATTORNEY VERIFIES THE PETITION, the affidavit thereto, or other proof, he must show his authority for making such verification. *Ib.*

14. WHERE A QUESTION IS MADE AS TO THE NUMBER AND AMOUNT OF CREDITORS, it is proper and the better practice to refer to a register or United States commissioner to examine the proofs, and report whether the required number and amount have joined therein. *Ib.*

15. PLEDGE OF STOCK AS COLLATERALS BY STOCKHOLDER WITH CORPORATION WHICH HAS GENERAL LIEN UPON SHARES OF ITS STOCKHOLDERS. — BILLS AND NOTES. — Where collateral securities are deposited for securing a particular note, with a banking company, by a stockholder, who also owes it other notes, the collaterals consisting in chief part of shares in the company and in part of other securities; and the charter and by-laws of the company give a general lien upon the shares of its stockholders for all debts due by them, and the maker of the notes afterwards becomes a bankrupt: *Held*, that the banking company has a general lien upon the shares of stock thus pledged, for the satisfaction of all the notes of the bankrupt due the company; that the remaining securities are bound for the other notes due, on the principle of equity; that, the equities being equal between the company and the general creditors in bankruptcy, the possession of the securities by the company gives it preference; that a bankruptcy court must rule as a court of equity would do, upon such a pledge of collaterals, unless it can be proved that the pledging of them was made by the bankrupt under circumstances that would render the preference void under the thirty-fifth section of the general bankruptcy act. *In re Peebles*, D. C. U. S. E. D. Va., *Ib.*

16. PROCEEDINGS TO SET ASIDE A FRAUDULENT CONVEYANCE cannot be instituted by a creditor after the commencement of proceedings in bankruptcy. *Hurmond v. Andrews*, Ct. App. Ky., *Ib.*

17. A DISCHARGE BARS THE CLAIM OF A CREDITOR, although it was fraudulently omitted from the schedule, and he received no notice of the pendency of the proceedings. *Ib.*

18. THE NOTICE REQUIRED TO GIVE THE COURT JURISDICTION to grant a discharge is the notice prescribed to be given on the application therefor. *Ib.*; *Black v. Blaw*, S. C. Mass., 15 N. B. R. No. 5.

19. PREFERRED CREDITOR. — DEED OF TRUST. — SURRENDER OF PREFERENCE. — A creditor who has never assented to a deed of trust, intended as a preference, and pur-

porting to secure his claim, may disclaim all interest therein, and prove his claim as unsecured. A trustee who accepts a deed of trust, given as a preference, and purporting to secure his claim, without any express qualification, assents to it as creditor, and cannot prove his claim without surrendering the preference. A preferred creditor may surrender his preference at the first meeting of creditors, and vote for an assignee. *In re Saunders*, D. C. U. S. Mass., *Ib*.

20. **PROOF BY AGENT.** — A mere agent holding negotiable paper cannot, under objection, prove it when the owner is in a situation to make the proof himself. *Ib*.

21. **CREDITOR MAY PROVE DEBT AGAINST FIRM, AND ALSO AGAINST SINGLE PARTNER.** — If a creditor holding a note against a firm proves it against the estate of two of the partners who took the assets and agreed to pay the firm debt, he may prove for the balance against the estate of the other partner, and share *pro rata* with his creditors. The rule in regard to the distribution of the assets of a firm does not apply where one partner alone is bankrupt. *In re Pease*, D. C. U. S. Minn., *Ib*.

22. **CONSTRUCTION OF WORD "PARTY."** — A witness summoned before the register on the application of the assignee, to be examined under section 5087 of the Revised Statutes, is not a "party" to such proceeding, and is therefore not entitled "to take the opinion of the district judge upon any point or matter arising in the course of such proceeding." A witness summoned as aforesaid, not being a "party" to the proceeding, is not entitled to be attended or represented by counsel during his examination. A creditor of the bankrupt is not a "party" to such proceeding, and is therefore not entitled to interfere with it, or to be represented in it by counsel. *In re Comstock*, D. C. U. S. Or., 13 N. B. R. No. 5.

23. **PREFERENCE DEFINED.** — IF THE BANKRUPT DELIVERED GOODS to the workmen of a creditor, upon the credit of the creditor, with the expectation that they would be paid for at the next pay day, there is no preference, although the creditor subsequently applies the amount to a preëxisting debt. *Rice v. Grafton Mills*, S. C. Mass., *Ib*.

24. **COMPOSITION.** — **PRACTICE.** — **CONFIRMATION, ETC.** — In composition cases the register is entitled to five dollars for incidental expenses; three dollars for the meeting; five dollars when acting under a special order; ten cents for filing each paper; twenty cents for each folio of the examination; twenty-five cents for each affidavit; one dollar for ordering an adjournment of a meeting, and ten cents for each folio of the report. When the resolution has been definitely passed upon, the business of the meeting is over and no adjournment is needed. The confirmation need not be presented at the meeting of creditors. If the confirmation is presented to the register, the time spent in examining it may be considered as spent under a special order. *In re Spillman*, D. C. U. S. Mass., *Ib*.

25. **REGISTER.** — **CHECK.** — **REGISTER'S LIEN.** — **CONTEMPT.** — A register is not bound to countersign a check unless the fee is first tendered to him. A register has a lien on the fund in court which has been awarded to a party. A party who seeks to review an act of a register must do so in a respectful manner. A wanton attack upon the character of a register, in a paper filed before the judge, is a contempt of court. *In re Breck*, D. C. U. S. So. D. N. Y., *Ib*.

26. **EVIDENCE.** — IN A PROCEEDING TO SET ASIDE A DISCHARGE, a creditor cannot rely upon testimony known to him before the granting of the discharge. *In re Marionneaux*, C. C. U. S. La., *Ib*.

27. *Ib*. — THE DYING DECLARATIONS OF A FRAUDULENT GRANTEE are not admissible against the bankrupt. *Ib*.

28. *Ib*. — DECLARATIONS OF CONSPIRATOR. — The alleged conspiracy must be established before the declarations of one conspirator are admissible against a co-conspirator. *Ib*.

29. **PROOF OF CLAIM CANNOT BE MADE BY A PREFERRED CREDITOR** after a judgment has been obtained against him setting aside the preference. *In re Cramer*, D. C. U. S. Minn., *Ib*.

30. A BOND FILED BY A CLAIMANT TO OBTAIN A DELIVERY OF PROPERTY TO HIM is not a debt created by fraud, although he subsequently endeavored to sustain his case by false testimony. *U. S. v. Rob Roy*, C. C. U. S. La., *Ib*.

31. A BOND TO RETURN PROPERTY if the decision in a case requires it, is not a provable debt if the decision is not rendered until after the final dividend. *Ib*.

32. IF THERE IS NO EVIDENCE WHEN THE FINAL DIVIDEND WAS MADE, no claims can be deemed provable except those which are liquidated and fixed at the time of the adjudication of bankruptcy. *Ib*.

33. TAXES WHERE REAL ESTATE IS IN HANDS OF ATTACHING CREDITORS. — Where it appears that creditors have taken the real estate of the bankrupts by levy or execution prior to the filing of the petition in bankruptcy, and under attachments valid as against the assignee, and the collector of taxes makes proof against the bankrupt estate, for taxes due on such real estate: *Held*, That it would be inequitable to allow the attaching creditors to escape the burden of the taxes on the estate they have acquired under their levy, if the taxes were at the time of the levy allowed and deducted from the valuation made by the appraisers. *Foster v. Ingles*, D. C. U. S. Me., lb.

See PLEADING AND PRACTICE, 1

### BILLS AND NOTES.

1. NOTE OF CORPORATION INDORSED BY BANKRUPT. — If a party intending to take the property of a corporation, and pay its debts, buys one of its notes indorsed by the bankrupt, this does not release the indorser. *In re Balch*, S. C. Mass., 13 N. B. R. Nos. 3 and 4.

2. ESTOPPEL. — A REPRESENTATION THAT A NOTE HAS BEEN PAID does not operate as an estoppel, unless there has been some actual loss. *Ib.*

3. IF THE MAKER OF A NOTE AGREES TO WAIT A CERTAIN TIME for another party to purchase his property and pay his debts, without any promise on the part of the proposed purchaser, and a friend advances money to purchase the note, there is no such agreement for time as will release the indorser. *Ib.*

4. CHECK. — PAYMENT BY DEPOSIT OF. — BANKS AND BANKING. — Where a check is drawn upon a particular bank, in favor of a person who has an account at such bank, is presented to the teller of such bank, who receives it, and enters in the pass-book of the person presenting it a credit for the amount of it, and, in the course of the day, the bank ascertains that there are no funds in its hands to the credit of the drawer of the check, and, thereupon, at the close of banking hours, returns the check to the person who presented it, the bank will not be liable to such person for the amount of the check. In the absence of an express agreement to the contrary, the bank will be deemed to have received the check for collection, and not as cash, and is entitled to a reasonable time, after receiving the check, to ascertain the state of the accounts of the drawer. But it seems that it would be otherwise, where the drawer subsequently during the day deposits funds sufficient to meet the check, which the bank applies to its own account, or in payment of other checks. *Nat'l Gold Bank v. McDonald*, S. C. Cal., Cent. L. J., Dec. 17, 1875.

See BANKRUPTCY, 5, 24.

CHECK. See BANKRUPTCY, 24; BILLS AND NOTES, 3.

### CORPORATION.

INDIVIDUAL LIABILITY. — IN INDIANA, under existing laws, the members of a manufacturing corporation are not individually liable for the debts of the corporation. *Wood v. Harrison*, S. C. Ind., Cent. L. J., Dec. 3, 1875.

See BANKRUPTCY, 7, 14; BILLS AND NOTES, 1.

### CRIMINAL LAW.

1. THE DISCHARGE OF THE JURY IN THE ABSENCE OF THE DEFENDANT, and when he cannot of his own motion be present, will bar any further prosecution. *State v. Wilson*, S. C. Ind., Mo. West Jur., Dec. 1875.

2. SALE OF LIQUOR BY DRUGGISTS. — Although a statute makes no exceptions in favor of druggists, in an act prohibiting the sale of intoxicating liquors, it was held that it did not apply to sales of liquors by druggists for necessary purposes. *Ball v. The State*, S. C. Ind., Mo. West Jur., Jan. 1876.

DEATH. See PRESUMPTIONS.

DRUGGIST, SALE OF LIQUOR BY. See CRIMINAL LAW 2.

### ELECTION.

REMOVAL OF COUNTY SEAT. — CONCLUSIVENESS OF ELECTION. — Where, in pursuance of the provisions of a statute, a petition for the relocation of a county seat has

been presented to the county commissioners and acted on by them, an election ordered, two elections had, the first not resulting in a majority for any place, the votes canvassed, and the place receiving the majority of the votes at the second election declared the county seat, the court will not inquire into the sufficiency of the petition and hear testimony to show that some of the names thereon were improperly there, and that therefore it did not contain the requisite number of petitioners. If a majority of the votes actually cast at a county seat election are in favor of one place, and it is declared the county seat, the court will not, under the statute of Kansas, receive any other evidence to show that the number of legal voters in the county exceeded the number of votes cast, and inquire whether the place declared the chosen county seat actually received the expressed consent of a majority of the electors. *State v. Woodford*, S. C. Kan., Cent. L. J., Dec. 17, 1875.

ESTOPPEL. See BILLS AND NOTES, 2.

### FRAUDS, STATUTE OF.

STATE OF GROWING TREES. — The plaintiff, being tenant in fee of certain copyhold land within a manor by the custom whereof trees growing on the lands were the property of the tenant in fee, having let the land to a yearly tenant, sold by parol to the defendant twenty-two specific trees, then growing on the land, upon the terms that they were to be cut down by the defendant and "got away as soon as possible," and to be paid for at a certain future day. The defendant almost immediately entered upon the land and cut down six of the trees, and sold to a third person the tops and stumps of several of the trees. The plaintiff then gave notice to the defendant that he forbade him to enter on the land, or to cut down or carry away any of the trees, and caused the gate of the field in which the trees were to be locked. The defendant disregarded this notice, cut down the remainder of the trees, and carried away the whole twenty-two of them, for this purpose breaking open the locked gate. The plaintiff brought trespass. *Held*, that such a contract was not "a contract for sale of lands, tenements, or hereditaments, or any interest in or concerning them," within the meaning of the 4th section of the statute of frauds; but that it fell within the 17th section of the statute of frauds, and that there was evidence of a sufficient acceptance and actual receipt to satisfy that section; and that (the court being at liberty to draw inferences of fact), consequently, the action was not maintainable, and that the parol license to enter and take the trees, being coupled with a valid sale of the trees, was irrevocable. *Marshall v. Green*, English Ct. Com. Pl., Albany L. J., Jan. 1, 1876.

GROWING TREES. See STATUTE OF FRAUDS.

### GUARDIAN.

GUARDIAN AD LITEM. — PURCHASE OF REAL ESTATE OF INFANT. — A guardian *ad litem* has no authority or control over the person or property of the infant for whom he acts, and no right to receive or administer the proceeds of the minor's property, which may be sold in the suit or proceeding in which he acts as such guardian *ad litem*; all that he does is under the supervision and subject to the sanction or disapproval of the court. Unlike other guardians and ordinary trustees, a guardian *ad litem*, if he has fairly advised the court of the infant's rights and done all for him that the facts of the case required him to do, may purchase and hold, in his own right, the property of the infant sold under an order of court in the cause in which such guardian *ad litem* was appointed, *provided* such purchase was in good faith and for a full valuable consideration paid by such guardian *ad litem*.

Where, in a proceeding by an administrator, under the Act of 1831, to sell the real estate of the intestate, a guardian *ad litem* was appointed by the court, and appeared and answered for the infant defendants, there being in fact nothing to urge against the propriety of such sale, and an order of sale was granted according to law, and such lands were fairly purchased by such guardian *ad litem*, without fraud and in good faith, in his own name, for two thirds of the appraised value, which sale was confirmed and a deed ordered to be made to him for the premises by the court, which was done: *Held*, in an action by such infant heirs, after coming of age, to have such purchaser declared their trustee of such real estate, alleging that he verbally agreed to purchase and hold the same in trust for them, that the fact of such agreement and its terms must be established with certainty and clearness, and if not so established, the petition of such plaintiffs ought to be dismissed. *Marsh v. Marsh*, Sup. Ct. Cin., Am. Law. Rec., Nov. 1875.

## HUSBAND AND WIFE.

**WIFE MAY COMPEL HUSBAND TO ACCOUNT.** — The separate estate of the wife under the statute of Illinois is a legal estate. And where such estate comes to the hands of the husband, and is used by him with her consent, the relation of principal and agent is created, and she may compel him by bill to account to her for such estate. If the husband claim the income of such estate as a gift from the wife, the burden is upon him to establish his claim by proof. *Patten v. Patten*, S. C. Ill., Am. Law Reg., Dec. 1875.

See **MECHANIC'S LIEN.**

**INFANT.** See **GUARDIAN.**

## INSURANCE.

1. **"VACANT AND UNOCCUPIED."** — A fair and reasonable construction of the language, "vacant and unoccupied," in a policy, is that it should be without an occupant, without any person living in it. The language is not used in a technical but in a popular sense. The tenant had removed some two months before, and was no longer occupying or paying rent for the house. He only held the key to deliver to the owner on his return. The owner had been notified of his removal, and had requested him to lease it to some one else, but afterward countermanded the order. There was a table, crib, and straw tick in the house for which no ownership was claimed. *Held*, that the house was vacant and unoccupied within the meaning of the policy. *Am. Ins. Co. v. Padfield*, S. C. Ill., Ins. L. J., Dec. 1875.

2. **DELIVERY OF "PAID-UP" IN LIEU OF "PARTICIPATING" POLICIES.** — It appeared from the evidence that the general agent induced the insured to take out policies on the ten-year life plan, by representing that the dividends after the fourth year would cancel the notes successively, and after two annual payments they would be entitled to paid-up participating policies for as many tenths on terms equally favorable. On finding after the fourth payment that the first note had not been cancelled by the dividends, paid-up policies were demanded from the agent in accordance with the understanding. Instead of participating policies, simple paid-up policies for reduced sums, together with the notes, were returned to them, which they repudiated after discovering their character. *Held*, that if the policies demanded had been returned it would have been a waiver of all questions of fraud in the procurement of the first policies; but after the tender and refusal, the plaintiffs had a right to decline a subsequent offer of participating policies; that the fact that the agent could not know what would be the further dividends of the company did not relieve his representations of their fraudulent character, and that as the original contracts were procured by fraudulent representations they were void *ab initio*, and complainants had a right to have them so declared and to have a decree for the money paid by them respectively. *Martin v. Aetna Life Ins. Co.*, S. C. Tenn., *Ib.*

3. **AN AGENT'S RECEIPT, SHOWING NO SPECIFIED PERIL INSURED AGAINST,** cannot be regarded as a complete contract. It must be treated as a mere application and evidence of a title to insurance. Where it was customary for the agent to issue such receipts as sufficiently binding, but afterward to exchange them for policies when requested, and no policy was asked for by insured: *Held*, that the insured must be presumed to have known the character of the company's business, and to have expected insurance on the usual terms. The insurance must be governed by the conditions imposed by such a contract as the insured was entitled to upon his application. *De Grove v. Met. Ins. Co.*, Com. App. N. Y., *Ib.*

4. **THE ASSIGNMENT OF A LIFE POLICY BY A MARRIED WOMAN UNDER CORRECTION** of her husband is invalid. The New York Act of 1840, exempting the policy issued in accordance with its provisions from the claims of personal representatives and creditors of the husband, is still in force. By it a married woman could insure for any sum, and the contract may be continued in favor of the children of the insured wife after her death, and the wife may not traffic with her policy as though it were realized personal property or an ordinary security for money. Subsequent legislation enlarging the powers of married women, under the Act of 1840, does not supersede it nor give them other power in dealing with a policy issued under it than they had by it. *Barry v. Eq. Life Ass. Soc.*, Ct. App. N. Y., *Ib.*

5. **ASSIGNMENT OF POLICY.** — **ASSENT OF INSURED.** — Insurance is a contract of

indemnity, appertaining to the person or party to the contract, rather than to the property subjected to the risk against which its owner is protected. The assent of the insurer to an assignment of a policy of insurance, upon a sale of the property named therein, constitutes a new and original promise to the assignee to indemnify him in like manner as the original insured was indemnified; and the exemption of the insurer from further liability to the vendor, and the premium already paid for insurance for a term not yet expired, are a good consideration for such promise, and constitute a new and valid contract between the insurer and the assignee. A mutual fire insurance company insured A, "his heirs, executors, administrators, and assigns," on his dwelling-house a certain sum, and "on furniture and clothing therein" a certain other sum. During the life of the policy, A sold the real estate to B, and assigned the policy to him, with the consent of the insurers. A did not sell his furniture and clothing to B, but removed them. B took possession of the house, and placed therein his own furniture and clothing, of equal character and value, and it was burned with the house. *Held*, B may recover of the insurers the amount of the original insurance upon the furniture and clothing of A. *Cummings v. Cheshire Co. Ins. Co.*, S. C. N. H., *Ib.*

6. MEASURE OF INDEMNITY — REINSURANCE. — In the case of an ordinary policy of insurance, and a loss, the sum insured is the extent of the insurer's liability, but not the measure of the claim of the assured. The contract being one of indemnity, he is entitled only to that, and the actual loss sustained by the assured is the measure of indemnity to which he is entitled when it is less than the sum insured. Where an insurance company, after having taken a risk and reinsured in another company to indemnify itself against loss on its policy, discharges its liability by the payment of a less sum than that reinsured, the sum so paid by it will be taken as the amount of damage sustained, and the measure of indemnity to be recovered of the second company. And where the policy of reinsurance contained this clause: "Loss, if any, payable *pro rata*, at the same time and in the same manner as the reinsured company," in case of a loss the reinsurer will only be bound to pay at the same rate the reinsured shall pay; so that, if the reinsured pays only ten cents on the dollar of its insurance, the reinsurer will pay at the same rate on the amount of its policy. *III. Mut. Fire Ins. Co. v. Andes Ins. Co.*, S. C. Ill., *Ins. L. J.*, Nov. 1875.

7. NOTICE AND PROOF OF DEATH. — A mere informal notification of the fact in a letter is sufficient as a notice of the death of the insured to the company. Seasonable proof of death might serve for both proof and notice, but a mere notice cannot supply the place of a formal proof. The two are entirely distinct. When the form of proof is not prescribed by the policy it must be such reasonable evidence as the party can command at the time, that the event has happened upon which the liability of the insurer depends. What is proof must be determined by the rules of evidence so far as they can be applied to extra-judicial proceedings. Neglect to notify a claimant that a mere notice of death is not proof, is not a waiver of a condition requiring such proof to be furnished. *O'Reilly v. Guard. Mut. Life Ins. Co.*, S. C. Mass., *Ib.*

8. THE MICHIGAN STATUTE AGAINST UNAUTHORIZED INSURANCE does not prohibit an unauthorized company from contracting in another state for insurance on Michigan property. *Clay, &c., Ins. Co. v. Huron, &c., Co.*, S. C. Mich., *Ib.*

9. CONSTRUCTION OF POLICY. — The policy insuring P., a corporation, described the property as "their three story," &c. "Loss, if any, payable to S., as his interest may appear." The policy contained a provision that it should be void if the insured did not own the property by a sole unconditional and entire ownership, so expressed in the written portion. *Held*, that where the whole declaration was constructed on the theory that the corporation plaintiff possessed the entire interest, the introduction of the expression, "for the use and benefit" of S. in the declaration had no effect to vary the issue from what it would have been if the phrase had been omitted; that the occurrence of the phrase in the policy did not necessitate proof of any interest by S. in the insured property; and that the possession of a bare legal title by the insured, while the equitable estate and interest, and the right to be immediately invested with the legal title, belonged to another, was not the unconditional ownership contemplated in the policy, and avoided the insurance. *Ib.*

10. LIABILITY OF SURETIES ON BOND OF AGENT. — An agent and his surety bound themselves, their heirs, executors, and administrators, jointly and severally, the condition being that the agent should promptly pay his balances during the time he officiated as agent. *Held*, that the heirs and legal representatives of the surety were bound for deficiencies in the agent's accounts occurring during his agency after the death of the bondsman. *Royal Ins. Co. v. Davies*, S. C. Iowa, *Ib.*

JURISDICTION. See BANKRUPTCY, 7, 17.

LEX LOCI CONTRACTUS. See USURY, 2.

### MASTER AND SERVANT.

NEGLIGENCE BY FELLOW-SERVANT. — DANGEROUS ACT. — The rule whereby a servant is precluded from indemnity against injury caused by the negligence of a fellow-servant, only extends to the ordinary employment of the servant. If the servant is ordered by a superior servant to do a dangerous act out of his ordinary course, whereby he suffers damage, the master will be responsible. *Mann v. Oriental Mill Co.*, S. C. R. I., Am. Law Reg., Dec. 1875.

### MECHANIC'S LIEN.

A MECHANIC'S LIEN TO BIND THE SEPARATE ESTATE OF THE WIFE must show coverage upon its face, and that the work was done with her knowledge and consent. *Dearie v. Martin*, S. C. Pa., W. L. R., Dec. 7, 1875.

### NATIONAL BANK.

SPECIAL DEPOSIT. — LIABILITY FOR. — NEGLIGENCE. — The cashier of a national bank, with the knowledge of the directors, received a deposit of bonds for safe keeping, which were subsequently lost. The depositor having indirectly acquired knowledge of the loss, he was requested by the cashier to keep quiet, and assured that the loss would be assumed by the bank. In an action against the bank to recover the value of the bonds, the evidence of other depositors was admitted, to rebut testimony that the bonds had been stolen, that they had never been notified of the loss of their bonds prior to the suspension of the bank. The court instructed the jury that the defendants were only liable for gross neglect, and defined it to be "the omission of those precautions which persons of common care and prudence would naturally adopt, though they might in reference to their own goods omit them." That "the failure of the bailee to give the bailor notice of the loss . . . raised a presumption of negligence, which presumption might be repelled; but even when thus repelled and rebutted, it still remained a question for the jury to determine whether any injury resulted to the plaintiff from the neglect of the defendant to give notice of the loss." *Held*: (1.) That the evidence of the depositors was collateral and superfluous, and therefore inadmissible. (2.) That the defendants were only responsible for "the omission of care which even the most inattentive and thoughtless men take of their own concerns." (3.) That the evidence of the failure to give plaintiff direct notice of the loss was only to be considered in relation to the question of gross negligence. Per WOODWARD, J.: (1.) That the mere fact that a gratuitous bailee has taken the same care of goods bailed as of his own does not *per se* relieve him from liability, though it would ordinarily create a presumption of adequate diligence. (2.) That when the directors of a national bank are aware that the cashier has voluntarily taken a deposit for safe keeping, the acquiescence of the officers creates a contract relation which renders the bank liable. *First Nat'l Bank v. Graham*, S. C. Pa., Leg. Gaz., Dec. 17, 1875; Leg. Int., Dec. 17, 1875.

### NEGLIGENCE.

INJURY TO HORSE. — C. bailed to B. a horse, for hire, to convey him from D. to S. B., upon arriving at S., put up the horse in a proper place, and the next morning properly watered, fed, and cared for her, and left her, intending to return, and in fact returning, within a suitable time to care for her, but having reason to apprehend that A., sixteen years of age, would attempt to water the horse during his absence. A. turned the horse loose to water her, and the horse, in consequence thereof, became lamed. *Held*, that these facts showed no evidence of lack of ordinary care and prudence on the part of B., and that he was not liable to C. for the damages. *Chase v. Moody*, S. C. N. H., Leg. Gaz., Jan. 7, 1876.

See MASTER AND SERVANT; NATIONAL BANK.

### PLEADING AND PRACTICE.

1. BANKRUPTCY. — CONTINUANCE. — If the court is satisfied that the refusal, on a suggestion of his bankruptcy, of a continuance, has worked injustice to a defendant, it



may in its discretion grant him a review. If a motion was made for a continuance upon a suggestion of the defendant's bankruptcy, before judgment, a discharge may be pleaded on the allowance of a writ of review. *Todd v. Barton*, S. C. Mass., 13 N. B. R. No. 5.

2. THE COMMISSIONERS OF THE FREEDMAN'S SAVINGS AND TRUST COMPANY, appointed in pursuance of the act of Congress of June 20, 1874, may maintain a suit in their own names to foreclose a mortgage to the Trust Company, to secure a loan of money, for which the company held the promissory note of one of the parties. *Creswell v. Williams*, S. C. D. C., W. L. R., Dec. 21, 1875.

See BANKRUPTCY, 4, 5, 6, 8, 10, 11, 12, 13, 15, 19, 20, 23, 24, 28, 30; HUSBAND AND WIFE.

### PRESUMPTIONS.

**PRESUMPTION OF DEATH.**—A mere failure to hear of or from a person for seven years, does not raise a presumption that death has occurred under particular circumstances. *McRee v. Copelin*, C. C. St. L. Co. Mo., Cent. L. J., Dec. 17, 1875.

### PRINCIPAL AND SURETY.

A SPECIAL ACT OF THE LEGISLATURE, giving time to a particular tax collector to collect and account for the taxes, operates to release his sureties. *Johnson v. Hacker*, S. C. Tenn., Am. Law Reg., Dec. 1875.

See INSURANCE, 10.

### RAILROAD.

**LIABILITY FOR FAILURE TO STOP AT PARTICULAR STATION.**—**DUTY AND RIGHTS OF PASSENGER AND COMPANY.**—If a person purchases a ticket for a particular railway train, and at the time is informed by the agent of the company that the train will stop at the station for which such ticket is purchased, he will have a right to take passage on such train, and it will become the duty of the person in charge of such train to allow him an opportunity of leaving the train at such station; and if, under such circumstances, the person in charge of such train does not stop the train at such station, but carries him on to another station, he may recover damages of the company. But if the person purchased the ticket without being so informed, and got upon a train which by the regulations of the railway company was not allowed to stop at the station for which his ticket was purchased (there being two daily trains which did stop there), such passenger could not require the conductor to stop the train at such station, and could not recover damages for being carried beyond it. It is the duty of a railway company to the public to run its trains according to its regulations. These cannot be infringed to accommodate a single passenger. It is the duty of each passenger to inform himself when, where, and how he can go or stop, according to the regulations of the company's trains, and if he makes a mistake which is not induced by the company's agent, he has no remedy. *P. C. & St. L. R. R. Co. v. Nazum*, S. C. Ind., Cent. L. J., Dec. 24, 1875; Leg. Gaz., Jan. 7, 1876.

### SPANISH GRANT.

**CONFIRMATION.**—**TITLE BY ADVERSE POSSESSION.**—*GIBSON v. CHOUTEAU*, 13 WALL. 92, CRITICISED.—A tract of eighty arpents in the Barriere des Noyers common fields was confirmed to one Jeanette, by the Old Board of Commissioners, November 11, 1811, under the second section of the act of Congress of March 3, 1807. The United States survey for Jeanette's representatives was approved March 22, 1848. A patent issued December 10, 1861, to Jeanette "or her legal representatives." In 1842, one Steitz entered into possession of a portion of said tract adversely to those then entitled as the legal representatives of Jeanette, from which time a continuous adverse possession existed until September 15, 1871, when Mary McRee, who had by various mesne conveyances acquired before the year 1850 all, or a portion of the title of Jeanette, brought an action of ejectment against the persons in possession claiming under said Steitz. *Held*: (1.) That the right created by the confirmation by the Old Board, at least from the date of approval of the United States survey in the year 1848, was not a mere right to a patent, but an estate in the land itself; that all it needed to make it complete was the mere formal legal title conferred by patent. (2.) That the so-called inchoate or equitable title or estate of a confirmer without patent has all the incidents of the most absolute estate in realty, and is as completely protected by the law of this state; that a right

of dower and an estate of tenancy by the curtesy may exist therein, and it may pass by descent and by will, and may be transferred by deed or by estoppel, and may be seized and sold on execution. (3.) That the rules applicable in determining the validity of a transfer of the estate of a confirmee without patent are those of the local municipal law of the state; that if by the law of the state an adverse possession during the period prescribed by the statute of limitations would work a transfer of an absolute fee simple estate to the adverse possessor, there can be no possible reason for making an exception of an adverse possession as a possible mode of transferring the estate of a confirmee without patent. (4.) That by the unquestioned law of this state, an adverse possession during the period prescribed by the statute does not merely bar an entry, but is as effectual as a deed of conveyance to transfer the title to the adverse possessor. (5.) That by the admitted adverse possession during a period of more than ten years prior to the patent of December 10, 1861, whatever estate Mrs. McRee at one time may have had was transferred to the adverse possessors, and they, and not she, at the date of the patent were the true owners of the so-called equitable estate, created by the confirmation to Jeanette, and hence her legal representatives. (6.) That the patent being to the "legal representatives" of Jeanette, the rights of the true owners of the inchoate or equitable estate are not compromised by an attempt to pass upon the deraignment of title, and therefore the adverse possessors come in under the terms of the patent as such owners, and hence as the legal representatives of Jeanette they are the patentees. (7.) That the doctrine here announced does not, in the least, conflict with that of *Gibson v. Chouteau*, 13 Wall. 92, inasmuch as in that case, the executive officers of the United States had passed upon the derivative title under O'Carroll — in the name of whose legal representatives the New Madrid location in question had been made — and had issued the patent to Mrs. McRee as such representative, and hence, as the case stood before the supreme court of the United States, the patent to Mrs. McRee had conclusively determined in her favor all matters bearing upon the deraignment of title, including adverse possession. *McRee v. Copelin*, C. C. St. L. Co. Mo., Cent. L. J., Dec. 17, 1875.

SPECIAL DEPOSIT. See NATIONAL BANK.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

#### TAXATION.

CHURCH PROPERTY. — REAL ESTATE OCCUPIED BY UNCOMPLETED CHURCH EDIFICE. — A religious society purchased a lot of land in a city for the purpose of building a house of worship. The lot was the only one so held, was not more than sufficient for its reasonable requirements in this respect, and was devoted by the society in good faith to the erection of a church edifice. The work was begun by driving piles for the foundation of the building, and, although reasonable diligence had been used, no further progress had been made, when a tax was assessed by the city on the land. *Held*, that the land was exempt from taxation under the Gen. Sts. c. 11, § 5, c. 7. *Trinity Church v. Boston*, S. C. Mass., Leg. Gaz., Dec. 31, 1875.

See BANKRUPTCY, 82.

#### USURY.

1. EXCESSIVE INTEREST AS LIQUIDATED DAMAGES. — A stipulation in a promissory note bearing ten per cent. interest per annum until maturity, with thirty per cent. thereafter as liquidated damages, is not usurious when made by the parties for the sole purpose of insuring prompt payment. *Downly v. Beach*, S. C. Ill., Mo. West. Jur., Jan. 1876.

2. LEX LOCI. — PREMIUM. — Where the borrower resided in Ohio, the laws of which state, at the time, allowed parties to contract for any rate of interest not exceeding ten per cent., and the lender resided in Pennsylvania, where six per cent. was the legal rate of interest; on a loan of money made in Ohio, the parties had a right to stipulate in the note, for interest at ten per cent. per annum, payable semi-annually, and make the note payable in Pennsylvania, without thereby rendering the contract usurious. In such case if the borrower, at his option, purchases exchange at a premium, and remits the amount of interest to the place of payment in this form, the premium thus paid for the exchange will not render the contract usurious. *Kilgore v. Dempsey*, S. C. Ohio, Leg. Gaz., Dec. 10, 1875.

# THE AMERICAN LAW TIMES.

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## NOTES OF OPINIONS, DECISIONS, AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1875.

Monday, January 17, 1876.

No. 81. *Joseph Moore, appellant, v. The United States.* Appeal from the Court of Claims. Mr. Justice Bradley delivered the opinion of the court, affirming the judgment of the court of claims. Dissenting, Mr. Justice Field. Mr. Justice Davis did not sit during the argument, and took no part in this decision. This was a claim for the proceeds of cotton under the Captured and Abandoned Property Act. As it appears that the claimant sold the cotton in question on the 12th of December, 1863, it is held that he is not entitled to recover the proceeds. As to the question whether it was competent for the court of claims to determine the signature to the alleged bill of sale by the claimant, by a comparison of the signature affixed with a signature admitted to be genuine to other papers in evidence without the testimony of experts, it is said that the court of claims, in the absence of express law on the subject, must be governed by the common law, and that while the rules of the common law would be adverse to the comparison made, still it has exceptions furnished by the ecclesiastical law equally well settled with the rule itself, and one of these exceptions is that if a paper, admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the case, the signature or paper in question may be compared with it by the jury, and as the court of claims is judge both of the law and the facts, the comparison was within the rule. Although not distinctly admitted that the signature with which the paper in question was compared was genuine, it was conceded to be so by counsel, and this was sufficient. To pretend otherwise, would operate as a fraud on the courts.

No. 100. *T. J. Haines et al., trustees, &c., appellants, v. Charles Carpenter, executor, &c.* Appeal from the Circuit Court of the United States for the District of Louisiana. Mr. Justice Bradley delivered the opinion of the court, affirming the decree of the said circuit court, with costs. In this case Judge BRADLEY writes: "A mere statement of the bill is sufficient to show that it cannot be sustained. Whilst it undoubtedly presents some matters of equitable consideration, they are so mixed up with others of a different character, or which cannot be entertained by the circuit court of the United States, and which constitute the main object and purpose of the suit, as to make the bill essentially bad on demurrer. In the first place, the great object of the suit is to enjoin and stop litigation in the state courts, and to bring all the litigated questions before the circuit court. This is one of the things which the federal courts are expressly prohibited from doing. By the Act of March 2, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a state court. This prohibition is repeated in section 720 of the Revised Statutes, and extends to all cases except where otherwise provided by the bankrupt law. This objection alone is sufficient ground for sustaining the demurrer to the bill. In the next place, the claim that the court ought to interfere on account of multiplicity of suits is manifestly unfounded. Only three suits are specified for this purpose in the bill, and each of these has a distinct object, founded on a distinct ground, and is instituted by a distinct class of claimants, who had a perfect right to institute the suit

they did. The state courts have full and ample jurisdiction of the cases, and no sufficient reason appears for interfering with their proceedings."

No. 91. *The Grand Trunk Railway Co. of Canada, plaintiff in error, v. R. M. Richardson et al.* In error to the Circuit Court of the United States for the District of Vermont. Mr. Justice Strong delivered the opinion of the court, affirming the judgment of the said circuit court with costs and interest. This was a writ of error to a recovery against the company for buildings destroyed by a fire kindled by one of its trains. The court held that it was competent to show that the buildings were within the roadway by the permission of the company, and that it was lawful for the company to license their erection, as it would have been lawful for the company itself to build them to increase facilities for the receipt and delivery of freight. Hence the objection by the company that it was without authority to make the contracts, and the buildings were therefore not lawfully within the roadway, is fallacious. There is nothing in the case to show, it is said, that any fault of the defendants here contributed to the loss if the buildings were lawfully placed where they stood.

No. 180. *M. M. Welton, plaintiff in error, v. The State of Missouri.* In error to the Supreme Court of the State of Missouri. Mr. Justice Field delivered the opinion of the court, reversing the judgment of the said supreme court, with costs, and remanding the cause, with directions to enter a judgment reversing the judgment of the circuit court of Henry County, and directing that court to discharge the defendant from imprisonment, and suffer him to depart without day. This was a writ of error to a conviction under the Missouri statute defining the status of peddlers, and prohibiting such from dealing in goods, wares, and merchandise, except books, charts, maps, and stationery, which are not the growth, production, or manufacture of the state, unless licensed to do so. The court below held the license to be a tax upon a calling, one which is limited to the sale of merchandise not the growth or product of the state, and therefore within state authority. This court admits the general power of the state to impose taxes by way of licenses upon all pursuits and occupations within its limits, but held the license in this case, although nominally upon the occupation, which consists in the sale of goods, to be in effect a tax upon the goods themselves, and that such a tax is not competent for the state to impose. It is a discrimination against the products of other states in the conditions of the sale by a certain class of dealers, and is in conflict with that clause of the federal Constitution which declares that Congress shall have power to regulate commerce with foreign nations and among the several states. To prescribe rules by which commerce shall be governed is to regulate commerce, and this power is vested in Congress without limitation. It is difficult to decide where the commercial power of Congress ends and that of the state begins, and it would be premature to state any general rule to be universally applied. But it is sufficient to hold in this case that the commercial power of Congress continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character.

No. 110. *Rufus Baker and Isaac F. Graham, assignees, plaintiffs in error, v. Henry S. White.* In error in the Circuit Court of the United States for the District of Connecticut. Mr. Justice Miller delivered the opinion of the court, dismissing the writ of error for want of jurisdiction. The court, however, expressed its concurrence in the view of the court below. The question was on the construction of a written contract of a special character.

No. 108. *Sarah E. and Minerva E. Loyd, appellants, v. M. C. Fulton, trustee, &c.* Appeal from the Circuit Court of the United States for the Northern District of Georgia. Mr. Justice Swayne delivered the opinion of the court, affirming the decree of the said circuit court, with costs. SWAYNE, J.: "The law of this case is too well settled to admit of doubt. In order to defeat a settlement made by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or creditors whose rights may, and do so supervene, — the settler purposing to throw the hazards of business in which he is about to engage upon others, instead of honestly holding his means subject to the chance of those adverse results to which all business enterprises are liable." The case involved only fact, the law being held to be as above stated.

No. 114. *Thomas Slater Smith et al., appellants, v. William Vogdes, assignee, &c.* Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. Mr. Justice Swayne delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause, with directions to dismiss the bill.

No. 113. *J. Young Scammon, appellants, v. Mark Kimball, assignee, &c.* Appeal from the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Clifford delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause for further proceedings, and decree in conformity with the opinion of this court. Mr. Justice Strong did not sit during the argument, and took no part in this decision. In this case it is found that any money deposited by the Mutual Security Insurance Company, of Chicago, with the complainant Scammon, and which he still owes to the company or to the assignee, was and is held by him as a private banker, and not as treasurer of the company, and it is held that any losses sustained by the complainants by the great fire at Chicago, for which the bankrupt corporation was and is liable as insurers, may be set off against that claim of the bankrupt corporation.

No. 119. *Asa Hodges, plaintiff in error, v. Mary A. Speake, administratrix, &c.* In error to the Circuit Court of the United States for the Eastern District of Arkansas. Mr. Chief Justice Waite announced the decision of the court, affirming the judgment of the said circuit court, with costs and interest.

No. 116. *The Delaware, Lackawanna & Western Railroad Co., appellant, v. Joseph Warren, assignee, &c.* Appeal from the Circuit Court of the United States for the Northern District of New York. Mr. Chief Justice Waite announced the decision of the court, reversing the decree of the said circuit court, with costs, and remanding the cause, with instructions to reverse the decree of the district court, and to direct that court to dismiss the bill. On authority of *Wilson v. City Bank*, 17 Wall. 473.

No. 115. *The Delaware, Lackawanna & Western Railroad Company, plaintiff in error, v. Joseph Warren, assignee*; and, No. 117. *The National City Bank, of New York, plaintiff in error, v. Joseph Warren, assignee.* In error to the Circuit Court of the United States for the Northern District of New York. Mr. Chief Justice Waite announced the decision of the court, reversing the judgments of the said circuit court, with costs, and remanding the causes with directions to reverse the judgments of the district court, and to direct that court to enter judgment in favor of the defendants there. On authority of *Wilson v. City Bank*, 17 Wall. 473.

No. 856. *John and J. K. Warren, plaintiffs in error, v. Sheridan Shook, late collector, &c.* Mr. Chief Justice Waite announced the decision of the court, granting the motion to advance this cause, and assigning it for argument on the 8th of February next.

## DIGEST OF CASES

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### ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany N. Y., WEED, PARSONS & CO.  
 Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.  
 Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & CO.  
 Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.  
 Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.  
 Daily Reg. — *Daily Register*, New York, 303 BROADWAY, N. Y.  
 Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.  
 Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.  
 Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.  
 Leg. Gaz. — *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.  
 Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.  
 Mo. West. Jur. — *Monthly Western Jurist*, Bloomington, Ill., T. F. TIPTON.  
 N. B. R. — *National Bankruptcy Register*, New York, McDIVITT, CAMPBELL & CO.  
 Pac. Law. Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGDARDUS.  
 Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.  
 W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.  
 West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & CO.

## ADMIRALTY.

1. **BILL OF LADING SIGNED BY MASTER CONTRARY TO DIRECTIONS OF CHARTERERS.** — A master signed a bill of lading to the order of the shipper, contrary to the directions of the charterers, who were the true owners of the cargo. The shipper then threatened the charterers that if they did not accept his draft, he would indorse the bill of lading over to a third party, and in order to obtain possession of the cargo, they accepted and paid the draft, and sued the master for damages to the amount of the payment, as for a breach of the charter-party. *Held*, that the master was not liable. When the property had once passed to the charterers the shipper could not reassert the title in himself by obtaining the bill of lading, nor could he transfer a good title even to one claiming under him in good faith. The bill of lading is powerless as against the true owner. Whether the master could have been held for any expense to which the charterers might have been put to vindicate their title, or for possible injury to third persons who might have advanced money on the bill of lading in ignorance of its invalidity — *quære*. *The Rawley*, D. C. U. S. Mass., Cent. L. J., Jan. 28, 1876.

2. **SALVAGE.** — WHERE THE MASTER OF A VESSEL IN DISTRESS ACCEPTS THE SERVICES OF SALVORS, and permits them to render assistance under the impression that their terms have been assented to by him, he cannot afterwards repudiate those terms, in the absence of evidence that they were compulsory or unconscionable. Where there is doubt whether an offer to render a salvage service upon certain terms was accepted, that doubt is removed by subsequent assent, ratification, and acquiescence. Where it appears that a contract for a salvage service was entered into fairly, without any compulsion or taking undue advantage, to make an unconscionable bargain, it should not be disturbed, especially if the amount agreed to be paid, does not materially vary from what the court would have awarded, had there been no contract. In estimating the value of a salvaged vessel for the purpose of fixing a salvage award, the court will adopt as the standard, the value of the vessel to the owners for the purposes of repair. A true result is reached by deducting from the value of the vessel, just before the collision, the cost of repair. *The Schooner Holgate*, D. C. U. S. Del., Leg. Gaz., Feb. 11, 1876.

## BANKRUPTCY.

1. **EVIDENCE.** — **DECLARATIONS OF BANKRUPT AND OF PARTNER OF BANKRUPT.** — The declarations of the bankrupt in regard to a transfer made as a preference are competent evidence against the preferred creditor, if the conspiracy to give the preference is established, although they were not made in the presence of or brought to the knowledge of the preferred creditor. The declarations of an alleged partner of the bankrupt in regard to the existence of the alleged partnership are not competent evidence. *Nudd v. Burrows*, S. C. U. S., 13 N. B. R. No. 7.

2. **AN ATTACHING CREDITOR MAY INTERVENE AND OPPOSE AN ADJUDICATION OF BANKRUPTCY.** *In re Jack*, C. C. U. S. N. D. Ga., *Ib*.

3. **NOTE GIVEN BY PARTY WHO HAS CEASED TO BE A TRADER.** — A person who gives a note when he has ceased to be a trader does not commit an act of bankruptcy by suspending payment thereof, although the note is given for a debt contracted while he was a trader, for the law requires that he shall be a trader at the time of making the note. *Ib*.

4. **MORTGAGE.** — **WHAT PORTION OF PROCEEDS MAY BE RETAINED BY BANKRUPT.** — Where the assignee petitions for an order that the bankrupt pay over to him the proceeds of a mortgage negotiated two days before filing the petition; *held*, that the bankrupt was entitled to retain therefrom: 1. The amount paid his counsel for preparing his petition and schedules. 2. Such amount as the assignee should determine to be necessary for the temporary support of himself and family, not exceeding, with his furniture and other articles, the sum of five hundred dollars; but that he was not entitled to retain the probable expenses of procuring his discharge. *In re Thompson*, D. C. U. S. E. D. Mich., *Ib*.

5. **LIMITATIONS.** — **FAILURE TO DISCOVER RIGHT OF ACTION.** — **TO WHAT CAUSES THE SECOND SECTION OF BANKRUPTCY ACT APPLIES.** — A right of action is barred by the limitation of two years, although the assignee did not discover the right until after the expiration of the two years. The limitation of two years applies to those causes of action which existed before the bankruptcy, and came to the assignee by the assignment, as well as to those which arise after the bankruptcy. *Norton v. De la Villebueve*, C. C. U. S. La., *Ib*.

6. **LOAN TO FROM SECURED BY NOTE OF INDIVIDUAL MEMBER OF FIRM.** — If a per-

son loans money for the use of a firm, and accepts the note of one partner, he cannot maintain an action against the firm. If a party who accepts the note of one partner is ignorant that the loan is for the firm, he cannot maintain an action against the firm after he has recovered a judgment against the partner on the note. *Herrick v. Herrick*, D. C. U. S. N. D. N. Y., *lb.*

7. A JUDGMENT AGAINST PARTNERS AND OTHERS JOINTLY is a several claim as against the bankrupts, and cannot receive a dividend from the joint estate. *Ib.*

8. UNAUTHORIZED DIVIDEND. — If the declaration of a dividend on a particular claim was unauthorized, the assignee may withhold its payment. *Ib.*

9. COSTS WHERE PROPERTY IS SOLD FOR CREDITORS. — ADJUSTMENT OF CLAIMS OF TRUSTEE, ETC. — Where property which is incumbered by liens is sold at the suggestion of the general creditors, and brings no more than the amount of the liens, it is not chargeable with any costs, except the actual costs of sale. Where property is sold free from a mortgage, the bankrupt court has no authority to adjust the claims of the trustee under the mortgage against the *cestui que trust*, nor to ascertain what is due by him to his counsel. *In re Blue Ridge Railroad Co.*, C. C. U. S. So. Ca., *Ib.*

10. AN AGREEMENT BETWEEN A PARTY WHO INTENDS TO BID AT AN ASSIGNEE'S SALE, AND THE ASSIGNEE'S SOLICITOR, that the former will let the latter have the property at a fixed price without any reference to the amount at which it may be bought, does not vitiate the sale. *Citizens' Bank v. Ober*, C. C. U. S. La., *Ib.*

11. IF THE BANKRUPT IS A PARTY TO A SUBMISSION OF A CONTROVERSY TO A REGISTER, he is bound by the decision in a collateral action. *Johnson v. Worden*, S. C. Vt., *Ib.*

12. DISCHARGE. — THE CLAIM OF A CONDITIONAL VENDOR FOR A CONVERSION of the property by the bankrupt is not barred by a discharge. *Ib.*

13. A CONDITIONAL VENDOR BY PROVING HIS DEBT does not lose his claim for the conversion of the property. *Ib.*

14. COMPOSITION. — INDORSED NOTES. — DIVIDEND. — CONSTRUCTION OF RESOLUTION. — A resolution of composition under the bankrupt act which provided that payment should be made by the delivery of indorsed promissory notes was sustained upon the ground that such phraseology would be interpreted to mean a payment in money within the meaning of the statute. There is no principle of law which constrains a court to construe the words, "Received in full payment," "Received in full satisfaction of," or other similar words, when applied to the reception of a note or other security in payment of an antecedent debt, to mean absolute satisfaction; but it is in all instances a question of fact and intention, to be deduced from the words of the instrument, and the facts in reference to which they have been employed. A resolution of composition under the statute will not be effective to discharge the debtor unless the dividend is actually paid to the creditor. The form of the resolution in question strongly disapproved by the court. *In re Hurst*, C. C. U. S. E. D. Mich., Chicago L. N., Jan. 29, 1876.

15. PETITION AGAINST CORPORATION. — REPEAL OF ORIGINAL ACT BY REV. STAT. — A petition to have a corporation adjudged a bankrupt may be maintained under § 5122 of the R. S. by any creditor of such corporation, and the provision of § 12 of the Act of June 22, 1874, in relation to the number and amount of the creditors required to join in such petition against a natural person, does not apply. The original bankrupt Act of 1867, and all the acts amendatory thereof, except the Act of 1874 aforesaid, were superseded by the title bankruptcy of the R. S. and repealed by § 5596 of said statutes. *Quære*, whether such repeal took effect from the enactment of the R. S. on June 22, 1874, or from December 1, 1873, the date on which said statutes took effect, as declared in § 5595 thereof. *In re Or. Bulletin, &c. Co.*, D. C. U. S. Or., Pac. Law Rep., Nov. 30, 1875.

16. COMPOSITION. — CONFIRMATION. — COMPENSATION OF REGISTER. — In composition cases the register is entitled to five dollars for incidental expenses; three dollars for the meeting; five dollars when acting under a special order; ten cents for filing each paper; twenty cents for each folio of the examination; twenty-five cents for each affidavit; one dollar for ordering an adjournment of a meeting, and ten cents for each folio of the report. When the resolution has been definitely passed upon, the business of the meeting is over and no adjournment is needed. The confirmation need not be presented at the meeting of creditors. If the confirmation is presented to the register, the time spent in examining it may be considered as spent under a special order. No memoranda are necessary in composition cases. *In re Spillman*, D. C. U. S. Mass., Chicago L. N., Jan. 22, 1876.

## BILL OF LADING. See ADMIRALTY; ESTOPPEL.

## BILLS AND NOTES.

1. NOTES SECURED BY DEED OF TRUST. — CONDITION THAT NONE OF NOTES SHALL BE COLLECTED TILL LAST IS DUE. — Where a deed of trust given to secure sundry notes maturing at different dates, provides that none of them shall become due, and that the deed shall not be foreclosed, till the maturity of the note made latest payable, the holder who purchases one of the notes with knowledge of the above provision cannot recover judgment thereon until the last note matures. In such suit, the note in action and the deed of trust may be read together and considered as one instrument. *Brownlee v. Arnold*, S. C. Mo., Mo. West. Jur., Dec. 1875.

2. LIMITATIONS. — PART PAYMENT ON A JOINT AND SEVERAL PROMISSORY NOTE by one of several makers will not prevent the running of the statute of limitations as to the other makers. *Hance v. Hair*, S. C. Ohio, lb.

3. FRAUDULENT ALTERATION OF NOTE. — If a note is issued in such form as to be easily altered without detection and is raised, the maker will be held liable to a *bonâ fide* holder for the face of the paper. *Brown v. Reed*,<sup>1</sup> S. C. Pa., Leg. Int., Jan. 12, 1876; Cent. L. J., Feb. 4, 1876.

4. NOTE SIGNED UNDER MISTAKE AS TO ITS CHARACTER. — NEGLIGENCE OF MAKER. — Where one voluntarily signs a promissory note, supposing it to be an obligation of a different character, but has full means of information in the premises, and neglects to avail himself thereof, relying on the representations of another, he cannot set up such ignorance and mistake, as a defence against an innocent holder for value before maturity. *Shirts v. Overjohn*, 60 Mo. 305 (2 Cent. L. J. 423), affirmed. If, however, his signature is procured without negligence on his part, and through artifice or fraudulent representation, the rule is different, and the jury should be left, under appropriate instructions, to determine these facts. *Frederick v. Clemens*, S. C. Mo., Cent. L. J., Jan. 14, 1876.

See BANKRUPTCY, 3, 6, 14; ESTOPPEL.

## BOARD OF TRADE.

USAGE. — RULE OF BOARD. — OPTION CONTRACTS. — Evidence of a usage among members of the Board of Trade of Chicago, that where the name of the principal is not demanded from the broker at the time of a transaction, the broker alone is accepted and considered the responsible party, is admissible to explain the intention of the parties, and to ascertain the nature and extent of their contracts. To constitute such a usage, there must have been such long and general acquiescence in it that the jury will feel themselves constrained to find that it entered into the minds of the parties and formed a part of the contract. A rule of the Board of Trade of Chicago, providing that on default of either party to a contract to make additional deposit of security or margin within the next banking hour, when demanded, the other may give notice to consider the contract filled at the market value of the article at the time of notice, is contrary to the law of the land and void. A party demanding performance of a contract must himself be ready, able, and willing to perform the contract on his part, and must, as a general rule, tender performance before he can put the other in default and recover for a breach; and a rule

<sup>1</sup> Judge SHARSWOOD, one of the ripest jurists on the bench, and especially in respect of the subject here involved, writing the opinion of the court, uses the following language: "The learned counsel for the plaintiff in error has appealed to us to reconsider and overrule *Phelan v. Moss*, 17 P. F. Smith, 59, and *Garrard v. Hadden*, lb., since followed in *Zimmerman v. Rote*, 25 P. F. Smith, 188. We mean, however, to adhere to these cases, as founded both on reason and authority, and as settling a principle of the utmost importance in the law of negotiable securities. That principle is, that if the maker of a bill, note, or check, issues it in such a condition that it can easily be altered without detection, he is liable to a *bonâ fide* holder, who takes it in the usual course of business before maturity. The maker ought surely not to be discharged from his obliga-

tions by reason, or on account of his own negligence in executing and issuing a note that invited tampering with. These cases did not decide that the maker would be bound to a *bonâ fide* holder on a note fraudulently altered, however skilful that alteration might be, provided, that he had himself used ordinary care and precaution. He would no more be responsible upon such an altered instrument than he would upon a skilful forgery of his handwriting. The principle to which I have adverted is well expressed in the opinion of the court in *Zimmerman v. Rote*, *supra*. It is the duty of the maker of the note to guard not only himself but the public against frauds and alterations, by refusing to sign negotiable paper made in such a form as to admit of fraudulent practices upon them with ease and without ready detection." — EDITOR.



of the Board of Trade dispensing with such readiness or tender is contrary to the law of the land and void. *Lyon v. Culbertson*, S. C. Ill., Chicago L. N., Feb. 5, 1876.

COERCION. See DURESS.

COMMON CARRIER. See ESTOPPEL.

### CONSTITUTIONAL LAW.

INVALIDITY OF ACT TO EFFECT INDIRECTLY OBJECT OF ACT DECLARED TO BE UNCONSTITUTIONAL. — The Wisconsin Act of 1870, ch. 56, § 22, requiring foreign insurance companies before being licensed to do business in that state, to enter into an agreement not to remove suits from the state courts to the federal courts, having been declared void by the supreme court of the United States (*Insurance Co. v. Morse*, 20 Wall. 445), the Act of April 5, 1872, making it the duty of the secretary of state to revoke the license of such companies in case of so removing suits is also void, and the circuit court of the United States will issue an injunction to the secretary of state restraining such revocation. *Hartford Fire Ins. Co. v. Doyle*, C. C. U. S. W. D. Wisc., Cent. L. J., Jan. 21, 1876.

### CONSTRUCTION OF STATUTES.

CONSTRUCTION OF STATUTE OF KENTUCKY TOUCHING ACTIONS FOR DEATH. — DEATH CAUSED BY SURGEON. — A statute of Kentucky enacts as follows: "If the life of any person is lost or destroyed by the wilful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid." Held, that this statute does not give a right of action for the loss of a life through the neglect or unskillfulness of a surgeon in dressing a wound; and that a petition which, with other proper allegations, stated that the defendant, a surgeon, "wholly failed and wilfully neglected and refused to comply with his said undertaking, and, on the contrary, so unskillfully, negligently, and improperly attended, set and bandaged, treated and cared for said fracture, that the life of plaintiff's intestate was thereby destroyed," — was bad on demurrer. *Parish v. Davidson's Adm'r*, Ct. App. Ky., Cent. L. J., Jan. 7, 1876.

See CONSTITUTIONAL LAW.

### CONTRACT.

1. AGREEMENT NOT TO USE BUILDING FOR PARTICULAR PURPOSE. — INJUNCTION. — A stipulation in a deed of conveyance, whereby the grantee, in part consideration for the conveyance, agrees for himself, his heirs, and assigns, that the premises conveyed shall not be used or occupied as a hotel, so long as certain other property owned by the grantor shall be used for that purpose, binds both the grantee and all claiming under him, and may, in equity, be enforced by injunction. *Stines v. Dorman*, S. C. O., Leg. Gaz., Feb. 4, 1876.

2. INVALIDITY OF CONTRACTS WHICH INVOLVE AGREEMENT TO INFLUENCE LEGISLATION. — Contracts which provide for compensation in consideration of particular service to be rendered, such as the collection of evidence, the preparation of papers, or the delivery of arguments in support of a claim, are legitimate everywhere; but where parties agree to pay any claim of a delegate in Congress for service rendered by him in securing the payment of a claim (where legislation is required for the payment), the contract is void as against public policy. *Weed v. Black*,<sup>1</sup> S. C. D. C., W. L. R., Jan. 19, 1876.

<sup>1</sup> Judge WYLLIE, writing for the court, thus states the rule: "If the terms of the contract be broad enough to cover services of any kind, whether secret or open, honest or dishonest, the law pronounces a ban upon the paper itself. Nor will honest services, substantially performed, sanctify an unlawful contract. But contracts which provide for compensation in consideration of par-

ticular services to be rendered, such as the collection of evidence, the preparation of papers, or the delivery of arguments in support of claims, are legitimate everywhere. Even these, however, would not be sustained if employed as covers for actual fraud, against the policy of the law." — EDITOR.

3. MERGER OF ORAL IN WRITTEN AGREEMENT. — Instruments of conveyance embodying the term of a contract may sometimes be executed and delivered in full performance of an oral agreement, and may even vary it, and then the oral agreement is considered as merged in the written. *Doty v. Martin*, S. C. Mich., Cent. L. J., Jan. 7, 1876.

4. PAROL EVIDENCE AS TO SO MUCH OF ORAL AGREEMENT AS HAS NOT BEEN MERGED IN A WRITTEN CONTRACT. — Where papers are executed and delivered in performance of a part only of an oral agreement, leaving some distinct portion untouched and unperformed, so much of the oral agreement as is left unperformed is not merged in the written agreement, and parol evidence to show what the actual agreement was is not then excluded.

5. SALE OF GOOD-WILL NOT WITHIN THE STATUTE OF FRAUDS AS A CONTRACT NOT TO BE PERFORMED WITHIN A YEAR. — An executed oral agreement for the sale of the good-will of one's professional practice is not void under the statute of frauds as a contract not to be performed within a year. When the practice is transferred, paid for, and entered upon, the parties have done what they could to make the transaction complete, even if the purchaser does not, within the year, reap all the benefits he expects from it.

6. MORTGAGE. — DOWER. — TAX-TITLE, ETC. — Defendants purchased of complainant a large quantity of land, giving for part of the purchase price two conditional notes, secured by mortgage on the lands; by the conditions of the notes, one was not to become due and payable until the complainant should obtain a release of a certain "apparent right of dower" existing on some of the lands, or until such "apparent right of dower should otherwise cease to exist;" and the other was not to become due and payable until the complainant should "clear up" the taxes and tax-titles standing against the lands. *Held*, that the court, being called upon to administer the doctrines of equity, would look at the essence and substance of the transaction, and only require such performance of the conditions as would give the defendants a fair, marketable title. *Held*, further, that the court would look into the facts of the case to see if there was any real or "apparent right of dower" at the time the notes were given, and would not require complainant to obtain a release of that which did not exist.

Under the statutes of Michigan, a woman who resides with her husband out of the state at the time the husband alone conveys lands within the state, has no contingent or inchoate right of dower in the lands so conveyed, and the facts being conceded, she has no "apparent right of dower."

A married woman cannot be made a party to a foreclosure suit in a case like this, for the purpose of litigating her supposed inchoate right of dower, nor were there any other legal proceedings open to complainant as between him and such married woman to test the matter.

There being no right of dower, nor "apparent right" at the time of the transaction: *Held*, that the failure of complainant to obtain a release was no defence to the note. In determining the question whether the tax-titles were extinguished, the court must act upon the evidence given; would not speculate upon possibilities, but determine from the evidence; and if, upon the proof, any tax-titles that were standing against the lands at the time of the transaction appeared to be extinguished, whether through the agency of the complainant or otherwise, they must be considered out of the way.

One who is a tenant in common with others of lands can acquire no title adversely to his co-tenants, by buying the lands for taxes levied thereon while he was such co-tenant. Nor will the purchase by him in the name of others create any title in such third persons adverse to his co-tenants.

The purchase by complainant of tax-titles, for taxes levied after he had parted with his interest in the lands, *prima facie* cut off all prior tax-titles, and "cleared up" such prior titles, so as to satisfy the condition of the second note.

Where the condition had not been entirely performed before the filing of the bill, but complainant appeared on the hearing to be then able and willing to perform: *Held*, that he should have a reasonable time to do such things as were found still undone, on which performance he should be allowed to foreclose his mortgage. *Ligare v. Semple*, S. C. Mich., Chicago L. N., Dec. 18, 1875.

See BANKRUPTCY, 10; BOARD OF TRADE.

## CRIMINAL LAW.

1. CONSPIRACY TO FRAUD THE REVENUE. — THE "ST. LOUIS WHISKEY RING." — DECLARATIONS OF CO-CONSPIRATORS. — GOOD CHARACTER. — The extent and nature of the conspiracy formed in 1871, and continuing until 1875, in the city of St. Louis, to defraud the government out of the tax levied upon the production of distilled spirits, stated. When and for what purpose the declarations of a conspirator can be admitted in evidence against the defendant, on an indictment charging him with complicity in the conspiracy. The substance of the testimony relied on by the government to show the defendant's connection with the conspiracy stated. The weight due in the law to the testimony of confessed conspirators and accomplices stated; and the rules of law laid down in respect to the power of juries to convict on such testimony when not corroborated. The defendant's previous good character; for what purposes it is to be considered by the jury, and to what extent available to the defendant. *U. S. v. McKee*, Cent. L. J., Feb. 11, 1876.

2. *IBID.* — On the trial of an indictment for a conspiracy to defraud the government out of internal revenue taxes, where a conspiracy has been proven and there is evidence connecting the defendant therewith, and one of the conspirators has testified to the fact that at the end of every week he gave to a co-conspirator certain moneys, the gains of the conspiracy, it is competent to show by the witness what directions he gave to such co-conspirator as to paying or delivering the money to the defendant. In such case the subsequent declarations of such co-conspirator as to what he did with the money so paid to him, are admissible as a part of the *res gestæ*, but not for the purpose of connecting the defendant with the conspiracy, and the jury should disregard it, unless they should be of opinion that the defendant has been connected with the conspiracy by evidence *aliunde*. In determining whether there has been sufficient evidence of a conspiracy to warrant, as against the defendant, the admission of evidence of the acts and declarations of the alleged conspirators, the court is not at liberty to reject the uncorroborated testimony of self-confessed accomplices and members of the conspiracy. Nor can the court declare, as matter of law, that such testimony is unworthy of belief unless corroborated. The credibility of such testimony is a question for the jury under the advice and direction of the court, and is not a question of law for the court. *Id.*

CUSTOM. See BOARD OF TRADE.

DOWER. See CONTRACT, 6.

DURESS.

RECEIPT OF CONFEDERATE MONEY UNDER PROTEST. — COMERCION DEFINED. — Where it appeared that the testator, who had for many years been a depositor in the branch of the Union Bank of Tennessee at Memphis, had, during the pending of the civil war, and while Memphis and West Tennessee were under Confederate military rule, and the courts were suspended, received notice from said branch bank to come and withdraw his deposit; and that the testator declined the persistent offer of the bank to pay him the amount of his deposit in Confederate money, but waived and delayed the matter for eight days, and then received the money under protest: and that there was a general excitement on the subject of Confederate money, but the testator was not compelled to withdraw his deposit, nor did he act under a sense of impending danger produced either by threats of the bank or fears that he would incur the penalty of any military order. Held (reversing the decree of the court below), that there was in the transaction no ground on which to hold that there was duress, coercion, or undue influence on the part of the bank, and the settlement made at the date of the withdrawal of the deposit was allowed to stand. *Fogg v. Union Bank*, S. C. Tenn., Chicago L. N., Dec. 25, 1875.

ESTOPPEL.

BILL OF LADING. — FORGERY OF WAREHOUSE RECEIPT BY AGENT. — BILLS AND NOTES. — COMMON CARRIER. — The defendant, in October, 1867, by its general agent, issued bills of lading to one Michaels. The bills named Armour & Plankinton as consignees. Michaels represented to the agent that he had a quantity of lard in a warehouse, and delivered to the agent, at the time he obtained the bills of lading, what

purported to be warehouse receipts for the lard. Defendant's agent received the receipts and delivered to Michaels the bills of lading. The warehouse receipts proved to be forgeries, and the defendants were unable to obtain any lard. Michaels drew drafts upon Armour & Plankinton, the plaintiffs, and attached the same to the bills of lading. Michaels procured a discount of the drafts and absconded with the money. No lard coming forward, the plaintiffs commenced suit. The agent of the company was informed by Michaels that the bills of lading were to be used at the bank. They were issued with the expectation that they would be acted upon by bankers and other capitalists. It (the company) cannot complain if the bills accomplished the purpose for which they were designed. The representation in the bills were made to any one, who, in the course of business might think fit to make advances on the faith of them. There is thus presented every element necessary to constitute an *estoppel in pais*. *Armour v. Mick. Cent. R. R. Co.*, Com. App. N. Y., Mo. West. Jur., Feb. 1876.

### EVIDENCE.

IN AN ACTION FOR THE WRONGFUL DIVERSION OF WATER used for a tannery, evidence of the *permanent* injury done to the market value of the tannery should not be admitted. That is not the true measure of damages. *Bare v. Hoffman*, S. C. Pa., Leg. Int., Dec. 24, 1875.

See BANKRUPTCY, 1; CONTRACT, 4; CRIMINAL LAW.

GOOD-WILL. See CONTRACT, 5.

INJUNCTION. See CONTRACT, 1.

### INSURANCE.

1. CONSTRUCTION OF POLICY. — CREDIT. — WAIVER OF CONDITION. — The policy provided that the premium should be due and payable on delivery, but where a credit was given for four months, the policy shall be in force during that time, but unless the premium is paid within four months, the company shall not be liable for a subsequent loss. The policy also provided that if no loss had occurred, payment of the premium after the four months renders the insurance valid. The policy was delivered by the agent, who had no authority to waive its conditions, with no demand for immediate payment. The property was burned after the expiration of the four months, the premium being still unpaid. In a similar contract between the parties a short time before, the premium was paid to the agent more than four months after delivery, and no objection was raised to the validity of the policy. *Held*, that the bare delivery of the policy, without demanding payment, did not of itself definitely fix the terms of credit at four months; that the policy condition requiring payment within four months was waived in the case of the prior policy, and there was ground for a jury to find that it was waived in the case of the second. *Bowman v. Ag. Ins. Co.*, Ct. App. N. Y., Ins. L. J., Jan. 1875.

2. THE INSURED HAD BEEN REPAIRING UNDER A SPECIAL PERMIT. — Work was stopped before the expiration of the permit. After the expiration the work was recommenced. In less than five days after the recommencement, the premises were burned from other causes. The policy permitted repairs during five days in each year without notice. *Held*, that there was no violation of the policy. *Rann v. Home Ins. Co.*, Ib.

3. MISREPRESENTATION AND WARRANTY. — The application, which was a warranty, contained the following interrogatories and answers: "Is the party subject to dyspepsia?" Ans. "None." "Has the party employed or consulted any physician?" Ans. "None." *Held*, that the fact of insured, from six months to a year previously, having suffered from dyspepsia while afflicted with an abscess, and having then employed a physician, was not conclusive evidence of a breach of warranty which would disturb the finding of a jury. *World Mut. Ins. Co. v. Schultz*, S. C. Ill., Ib.

4. MISSTATEMENTS IN APPLICATION. — The insured answered in the application that neither his parents, brothers, or sisters had been afflicted with pulmonary or scrofulous disease. In another answer he states that his mother died of scrofula. He also answered that one of his brothers died of unknown disease, and one of his sisters died of a disease of the blood. It was not shown that the father, or two of the brothers, or one sister had been afflicted with scrofula. *Held*, that there was no misstatement as to the mother, and that where from the testimony there is room for a reasonable doubt whether

insured knew that his brother and sister died of scrofula, the court will not pronounce the answers a misstatement as a matter of law.

Insured stated that he had no scrofula as he was aware of. *Held*, that it was a question for the jury whether he was aware of it.

The insured did not communicate the facts that he was lame and had an affection of the groin. *Held*, where there was no general or specific questions calling for these facts, and the question whether his usual good health was impaired by the affection in the groin was fairly submitted to the jury, the court will not overrule the finding and pronounce the failure to mention these affections a concealment of circumstances hazardous to the policy. *Swift v. Mass. Mut. Life Ins. Co.*, Ct. App. N. Y., *lb.*

5. OTHER INSURANCE. — ESTOPPEL. — A policy stipulated that the procurement of other insurance should make it void if procured without the consent of the company. Other insurance being in fact obtained, if the first insurer, on being afterward informed of it, raises no objection further than to ask why it was not obtained from him, and otherwise treats it as a matter of course, he estops himself from repudiating his liability for loss that occurs after his conduct has induced the insured to rest satisfied with his policies. Where an insurance policy stipulates that other insurance obtained without the consent of the company shall invalidate the policy, but contains the clause, “\$3,000 other insurance permitted,” it is to be assumed that consent to future insurance need not be more definite, *e. g.*, in specifying the companies granting it by name. *West. Fire Ins. Co. v. Earle*, S. C. Mich., *lb.*

6. DELIVERY OF POLICY BY AGENT. — Where dealings were had exclusively with the insurance agent, his delivery of the policy is binding on the company, even though it be not countersigned as required by their rules. Delivery is a waiver of the formal condition. *lb.*

7. NATURE OF CONTRACT OF INSURANCE. — ASSIGNMENT OF POLICY. — CONSTRUCTION OF POLICY. — Insurance is a contract of indemnity, appertaining to the person or party to the contract, rather than to the property subjected to the risk against which its owner is protected. The assent of the insurer to an assignment of a policy of insurance, upon a sale of the property named therein, constitutes a new and original promise to the assignee to indemnify him in like manner as the original insured was indemnified; and the exemption of the insurer from further liability to the vendor, and the premiums already paid for insurance for a term not yet expired, are a good consideration for such promise, and constitute a new and valid contract between the insurer and the assignee. A mutual fire insurance company insured A, “his heirs, executors, administrators, and assigns,” on his dwelling-house a certain sum, and “on furniture and clothing therein” a certain other sum. During the life of the policy, A sold the real estate to B, and assigned the policy to him, with the consent of the insurers. A did not sell his furniture and clothing to B, but removed it. B took possession of the house, and placed therein his own furniture and clothing, of equal character and value, and it was burned with the house. *Held*, B may recover of the insurers the amount of the original insurance upon the furniture and clothing of A. *Cummings v. The Cheshire County M. F. Ins. Co.*, S. C. N. H., *Leg. Gaz.*, Jan. 21, 1876.

See CONSTITUTIONAL LAW.

LIMITATIONS. See BANKRUPTCY, 5 ; BILLS AND NOTES, 2.

#### MARRIED WOMAN.

LIABILITY OF SEPARATE ESTATE OF, UPON PROMISE TO PAY DEBTS OF HUSBAND. — Property was settled upon a trustee to be held for the sole and separate use of a *feme covert*, and vesting in her an absolute and exclusive control and a complete *jus disponendi*. Either she or her husband contracted debts with a firm of commission merchants, and afterwards her husband and herself addressed a letter to this firm promising to pay the debts out of the proceeds of such separate estate. The court, being of opinion that the credits were given on the faith of the separate estate, held (reversing the court below), that it ought to be subjected to the satisfaction of the debts. *Musson v. Trigg*, S. C. Miss., Cent. L. J., Feb. 4, 1876.

#### MECHANIC'S LIEN.

A MECHANIC'S LIEN FILED AGAINST TWO BLOCKS OF HOUSES, built under the same

contract, divided merely by a private way, the right to which belongs to both blocks, may be apportioned among the several houses. *Fitzpatrick v. Allen*, S. C. Pa., Leg. Gaz., Jan. 21, 1876.

MORTGAGE. See BANKRUPTCY, 4, 9; CONTRACT, 6.

### MUNICIPAL CORPORATION.

1. CAN ACT ONLY THROUGH ITS LEGAL REPRESENTATIVES. — INVALIDITY OF CONTRACT BY CITY ENGINEER ACTING UNDER RESOLUTION OF CITY COUNCIL. — The adoption by a city council of a resolution, ordering the city engineer to let out a contract for macadamizing a street, without the concurrent action of the mayor, is a nullity, imposing no legal objection whatever upon the municipality, and gives the contractor no right of action against the adjoining property owners. Nor will the city be liable to him for expenditures in endeavoring to enforce the collection of his tax-bills against itself. The principles of law that govern cases of illegal or imperfect execution of municipal powers, or cases where an absolute duty is imposed upon the corporation, have no application to the state of facts supposed, for a municipality cannot act at all except through the mayor and council, and the propriety of improving a street is a matter resting in the sound discretion of its officers. Moreover, the contractor must be held to know the law, and will be presumed to know that his claim is invalid. *Saxton v. City of St. Joseph*, S. C. Mo., West Jur., Dec. 1875.

2. NEGLIGENCE IN CONNECTION WITH PERFORMANCE OF UNAUTHORIZED WORK. — The rule, that when a city undertakes the execution of public work authorized by its charter, though it is not bound to undertake the same, it is liable for negligence in the performance of such work, does not apply to defective municipal legislation. *Id.*

NEGLIGENCE. See BILLS AND NOTES, 3, 4; RAILROAD.

OPTION CONTRACT. See BOARD OF TRADE.

### PLEADING AND PRACTICE.

DEPOSITIONS IN U. S. COURTS. — REQUISITES OF EXPLAINED, ETC. — Section 866 of the R. S. gives the courts of the U. S. power to grant a *dedimus* to take the examination of a witness whenever in their judgment it may be necessary to prevent a failure or delay of justice; and §§ 863-4-5 of said R. S., relating to taking depositions *de bene esse*, have no application to the granting or execution of said *dedimus*. The mode of issuing and executing a *dedimus* granted in pursuance of said § 866 is regulated by "common usage" or practice, which usage or practice, as to this court, is prescribed by §§ 807-8-9 of the Or. Civ. Code, relating to taking depositions on commission; and title 7 of chapter 9 of said Code, relating to taking depositions *de bene esse*, does not apply. A person appointed to execute a *dedimus* represents the court and not the parties; and his commission should contain full directions as to the manner of its execution, as set forth in § 809 of the Or. Civ. Code. In certifying the deposition to the court it is not necessary for the commissioner to state when or where the examination of the witness was taken, nor by whom it was reduced to writing, or that the witness was "cautioned" before being sworn. A witness examined under a *dedimus* should be sworn according to the law of the forum from whence it issued. Section 860 of the Or. Civ. Code having provided that an affirmation may be made by any person in place of an oath, a *dedimus* which authorizes the commissioner to administer an oath to a witness is well executed in this respect, when it appears from the return thereto that the witness was duly affirmed. A return to a *dedimus* need not show how a witness was sworn or affirmed, so that it states substantially that the witness was *duly* sworn or affirmed; nor is it material whether the facts required to be stated in such return are stated in the introduction or conclusion of the examination, so that they are plainly referred to and included by the commissioner in certifying the deposition as a part of the proceeding and return. *Jones v. Or. Cent. R. W. Co.*, D. C. U. S. Or., Chicago L. N., Jan. 1, 1876.

See BANKRUPTCY 2, 4, 8, 9, 14, 16; REMOVAL OF CAUSES.

### RAILROAD.

NEGLIGENCE. — INJURY TO PERSON PASSING BETWEEN CARS THAT OBSTRUCT

**HIGHWAY. — DUTY OF RAILROAD TO GIVE SIGNAL, ETC.** — The plaintiff was on his way to his place of employment, along Ninth Street, in the city of Washington. The defendant's train of freight cars was lying along Maryland Avenue, between 7th and 8th streets, nearly to 10th, and obstructing the cross-walk at its intersection with 9th. The train had an engine attached at the west end. The plaintiff attempted to pass over said train between two of the cars, and while so crossing, the train was started without any signal or warning, throwing the plaintiff so that his foot was caught between the bull noses and crushed. The avenue was impassable except at the street crossings, and the plaintiff could not have passed to the opposite side, without going out of his way a distance of two squares. The court of first instance instructed the jury as follows: "If the jury find from the testimony that the train of the defendant was lying across Ninth Street; that the plaintiff got on the train when it was standing still; that the injury to the plaintiff was occasioned by suddenly starting the train either backward or forward; that there was no notice given of the movement of the train, either by ringing a bell, blowing a whistle, or otherwise, and that theretofore the defendant had been in the habit of obstructing Ninth Street; that footmen had theretofore been in the habit of passing under and over the cars in the presence of the employees of the defendant having charge of the train, with their acquiescence, and without their protest. If you find these conclusions concurring, the defendant is liable; these facts concurring make it the duty of the defendant to give notice of some kind before moving." *Held*, that there was no error. *Grant v. B. & P. R. R. Co.*, W. L. R., Jan. 26, 1876.

### REMOVAL OF CAUSES.

1. **APPLICATION REMOVES CAUSE IPSO FACTO. — WHEN APPLICATION SHOULD BE MADE.** — The rule is said to be well settled that the application to remove a cause is, if sufficient, effectual to remove the cause, however it may be disposed of by the state court. Where the application to remove a cause was made during the term of the federal court which preceded the passage of the Act of March 3, 1875, and before the actual trial of the cause, but at the date subsequent to the passage of the act, it was held to be in time. The statute should be construed to refer to a term occurring after the passage of the Act of 1875. See *Andrews's Ex'rs v. Garrett*, 2 Cent. L. J. 797. *Merchants', &c. Bank v. Wheeler*, C. C. U. S. So. D. N. Y., Cent. L. J., Jan. 7, 1876.

2. **REMOVAL AFTER ISSUE JOINED. — PLEADING.** — Where a suit not in equity or in admiralty is removed after issue joined, no other or different pleadings are necessary than those filed in the state court. *Id.*

3. **WHEN REMOVAL MAY BE MADE.** — A suit was pending in the supreme court of California on appeal from the judgment of the district court at the date of the passage of the Act of Congress of March 3, 1875, relating to the jurisdiction of the United States circuit courts, in which the judgment was reversed and the cause subsequently remanded to the district court for new trial. At the first term of the district court at which a trial could be had after the filing of the *remittitur* and before any other trial, the suit was removed to the United States circuit court, on application of the plaintiff. *Held*, that the case is within the provisions of sections 2 and 3 of said act of Congress, and that it was properly removed. *Hoadley v. City of San Francisco*, C. C. U. S. Cal., Chicago L. N., Jan. 15, 1876.

4. **IBID.** — A suit commenced and actually tried in a state court before the passage of the Act of Congress of March 3, 1875, but in which a new trial had been granted, and which was pending after the passage of the said act, may be removed from such state court to the circuit court of the United States. The condition of the suit, or the time it has been pending, makes no difference in the jurisdiction. *Andrews v. Garrett*, C. C. U. S. So. D. Ohio, Chicago L. N., Jan. 8, 1875.

### TRUSTS.

**STATEMENT BY A THAT HE HELD PROPERTY FOR B NOT SUFFICIENT TO CREATE TRUST.** — Where B declared that he was holding certain stock for the benefit of his brother, and made an affidavit to that effect for the purpose of being relieved from a tax, which otherwise he would have been obliged to pay for the stock; when, in point of fact, he had purchased and paid for the stock himself, and it stood in the books of the company in his name, and he retained possession of the certificate therefor until his death, his bad faith in this respect is not sufficient to create a trust or claim of title on the part of such brother. He who sets up a claim to property of any kind must estab-

lish his own right. If he has no right in himself, it matters not what declaration may have been made to others by the party to whom it does in fact belong, especially where there has been no delivery of possession. *Brick v. Brick*, S. C. D. C., W. L. R., Jan. 12, 1876.

USAGE. See BOARD OF TRADE.

## SUPREME COURT OF NEW HAMPSHIRE.

(55 N. H.)

EVIDENCE. — CERTIFICATE OF PUBLIC OFFICER.

BULLOCK v. WALLINGFORD.

A certificate from the United States Commissioner of Patents that diligent search has been made, and that it does not appear that a certain patent has been issued, is not competent evidence of that fact.

ASSUMPSIT, to recover the contents of a promissory note, made by the defendant, payable to John C. Thompson, or order, on the first day of December, 1873, and by said Thompson indorsed to the plaintiff. Tried before Stanley, J., and a jury. The defence set up was, that the note was without consideration, and obtained by Thompson by fraud; that it was not purchased by the plaintiff in good faith, nor indorsed until after it became due. The defendant offered evidence tending to show that the consideration of the note was the sale by Thompson to him of the right to sell in various towns in this state an improvement in mowing-machine grinders, alleged to have been patented by one L. P. Thompson; and that said John C. Thompson falsely and fraudulently represented to him that a patent had been obtained upon this invention, and that he had seen the letters-patent. As evidence tending to show that the note was without consideration, and that Thompson's representations were false and fraudulent, the defendant offered a certificate purporting to be issued from the Patent-office of the United States, of which the following is a copy:—

### "THE U. S. PATENT-OFFICE.

*"To all persons to whom these presents shall come:*

*"This is to certify that a diligent search has been made, and it does not appear that a patent has been issued to L. P. Thompson for improvement in mowing-machine grinders, from January 1, to present date.*

*"In testimony whereof, I, J. M. Thacher, acting commissioner of patents, have caused the seal of the Patent-office to be hereunto affixed, this third day of December, [L. S.] in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-eighth.*

*"J. M. THACHER, Acting Commissioner."*

The plaintiff objected to the admission of this evidence; but the objection was overruled, and the paper admitted in evidence, to which the plaintiff excepted. The jury having returned a verdict for the defendant, the plaintiff moved that the same be set aside and for a new trial; and it was ordered, that the questions of law arising on the foregoing case be transferred to this court for determination.

*Wheeler & Faulkner*, for the plaintiff.

*Wadleigh & Wallace*, for the defendant.

LADD, J. I think the paper signed by J. M. Thacher, acting commissioner of patents, was clearly inadmissible. It is not and does not purport to be a copy of any record or paper existing in the Patent-office, but is simply the statement of a fact within the knowledge of the gentleman who signed it. The plaintiff was entitled to have that fact proved in the usual way, and could not legally be deprived of the privilege of cross-examination by the form in which the statement was put. I think the verdict must be set aside.

CUSHING, C. J. By Rev. Stats. U. S. p. 166, sec. 882, it is provided, that "Copies of any books, records, papers, or documents, in any of the executive departments, authen-



ticated under the seals of such departments respectively, shall be admitted in evidence equally with the originals thereof."

It is clear that this section does not make the certificate in question evidence, since it relates only to copies, and I know of no other statute which could apply to the case. In the absence of statutory regulations, this certificate must be governed by the ordinary rules of evidence. It is not under oath, neither has it any of the other requisites to make it admissible as a deposition.

SMITH, J. The certificate should have been rejected. It was the conclusion drawn by the certifying officer from the examination of the records in his office, and possibly he may have been mistaken. *Hanson v. So. Scituate*, 115 Mass. 336. The statute authorizes him to certify to the correctness of copies of records in his office. What effect shall be given to such copies is a question for the court when put in evidence. When a party desires to prove the negative fact that there is no record, he must do so in the usual way, — by the deposition of the proper officer, or by producing him in court so that he may be sworn and cross-examined as to the thoroughness of the search made. If the summoning of such officer to testify in relation to the public records at the call of a suitor shall be found impracticable by reason of interfering with his public duties, the remedy must be found in further legislation. The court cannot disregard the plain rules of evidence to meet the difficulty.

*Verdict set aside and a new trial granted.*

## SUPREME COURT OF PENNSYLVANIA.

(From the Legal Gazette, Feb. 18, 1876.)

### THE PHILADELPHIA HYDRAULIC WORKS v. SCHENCK.

Where A contracted to erect machinery according to written specifications, and subsequently abandoned the work, and B contracted to "complete" the work according to the specifications, B is not responsible for the sufficiency of the plan, nor for the work done by A. It was error to instruct the jury that B stood in the shoes of A.

ERROR to the district court for the city and county of Philadelphia.

SHARSWOOD, J. Le Van & Co. having agreed with the defendant to erect for him certain machinery according to a written specification, abandoned the work before it was finished. The defendant then made a contract with the plaintiffs "to complete the work as per contract" between W. B. Le Van & Co. and him. The plaintiffs went on and completed the work, and initiated their action in the court below to recover the amount which the defendant agreed to pay them. No question seems to have arisen on the trial as to the work done by the plaintiffs, but objection was made to their recovery on the ground that the work done by Le Van & Co. was defective, and prevented the proper operation of the machinery. The learned judge instructed the jury that the plaintiffs had placed themselves in the shoes of the original contractors, and that any defence which would have availed the defendant against them would be equally good as against the plaintiffs.

We think that in this there was error. The defendant took the unfinished work from the hands of the first contractors, and made a new agreement with the plaintiffs to finish it according to the specifications contained in the first contract. The first contract is referred to in the second, only for this purpose. Had the agreement of the plaintiffs been with Le Van & Co. to go on and complete the work, then indeed they would have stood in their shoes, and could have recovered nothing, except what Le Van would have been entitled to recover. Here, however, there was an entirely new contract, though the terms and specifications of the old contract were referred to, and incorporated in it as to the work to be done by the plaintiffs. There is not a word in the letter of the defendant accepted by the plaintiffs, which proves the contract, which can justify the conclusion that the plaintiffs had agreed to become responsible, either for the sufficiency of the plan or of the work done by their predecessors. They were to complete the work, that is, do what remained to be done, and if they did their part in a skilful and workman-like manner, why should they be answerable, either for the sufficiency of the plan, or

for the work done by others? It is true, that what they were to receive was not to exceed the amount which was due to Le Van & Co. had they gone on and finished the work, — and it is said in defendant's letter, that if the amount of plaintiffs' bill should exceed the sum thus due, Le Van & Co. agreed to answer the excess. We may assume that Le Van & Co. were parties to the arrangement, and did agree as stated in the letter. We can see nothing in this like an assignment by Le Van & Co. of the contract to the plaintiffs, and agreement by them to stand in their shoes. To make the builder of a house responsible for defects in the plan of the architect, would not be any worse, and unsupported by reason and authority, than to visit upon a man who has agreed to complete a work according to specifications — liability for the faults of others who have gone before him.

Judgment reversed, and *venire facias de novo* awarded.

### NOTES OF NEW BOOKS.

MESSRS. DIOSY & Co. of New York announce the following : —

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THE MESSRS. MORRISON have also recently published a Collection of Patent, Trade-mark, and Copyright Cases decided in the Supreme Court, covering the period from the 1st of Black to the 20th of Wallace, with a Table of Cases cited, affirmed, and reversed. The work is edited by C. I. Whitman, Esq., and edited as such collections should be. Mr. Whitman has given the original head-notes, a course that is the only safe one where the original reporting is even fairly done. To "rewrite" a syllabus is often to misconstrue an opinion. Every syllabus is full of danger if it be really a syllabus. But in any event to have given the profession anything short of the results of Mr. Wallace's labors would have been unfortunate.

The Table of Cases affirmed and reversed is meritorious, although it contains some errors. The inevitable pad of statute law concludes the volume. No patent lawyer will hesitate to accept the book as a very satisfactory one, and as a timely addition to his never complete list of hand-books.

# THE AMERICAN LAW TIMES.

NEW SERIES. — APRIL, 1876. — VOL. III., No. 4.

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## NOTES OF OPINIONS, DECISIONS, AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1875.

Monday, January 24, 1876.

No. 51. *The Mississippi & Missouri Railroad Co., appellants, v. Charles T. Cromwell.* Appeal from the Circuit Court of the United States for the District of Iowa. Mr. Justice Bradley delivered the opinion of the court, reversing the decree of the said court, with costs, and remanding the cause, with directions to dismiss the bill of complaint. This bill was filed to compel the railroad company to transfer to the complainant on its books and to issue to him a certificate for certain shares of stock which he claimed to have purchased at a sale on execution. The court hold that as the stock of the company had become worthless, and had gone with its franchises and the small percentage the stockholders had expected to realize, and consequently it would have been nothing but an empty name, kept afloat only for speculative purposes, the proceeding is not such as should recommend it to a court of equity. The parties to such a transaction ought at least to be left to their remedies at law. A court of equity, it is said, should have no sympathy with any such contrivances to gain a contingent or speculative advantage if such was sought.

No. 67. *Caleb Ives and George B. Green, plaintiffs in error, v. Milton A. Hamilton, administrator, &c.* In error to the Circuit Court of the United States for the Eastern District of Michigan. Mr. Justice Bradley delivered the opinion of the court, affirming the judgment of the said court, with costs and interest. This was the affirmance of a judgment sustaining a patent to Hamilton for an improvement in saw-mills, and against the plaintiffs in error for an infringement. It is held that the improvement was novel and the proper subject of a patent, and that the specifications were sufficient.

No. 74. *Ann Kittredge, widow, &c., plaintiff in error, v. Olivia C. Race and her husband.* In error to the Circuit Court of the United States for the District of Louisiana. Mr. Justice Bradley delivered the opinion of the court, affirming the judgment of the said court, with costs. This was an action by Mrs. Race and her husband to recover on two promissory notes given to Dr. Kittredge, deceased, former husband of the administratrix and father of the plaintiff, in settlement of the latter's share of her mother's estate, the first wife of the doctor. The judgment was against the administratrix as such, and also as the tutrix of the minor children, against the objection that the suit could not be maintained against her in those capacities, and if it could the claim was barred by limitation. The judgment is here affirmed, the court holding that the first objection is one of form rather than of substance, and remarking that in common law actions it is not usual to render two distinct judgments against executors in their personal and official capacities. The community of interests is liable, and the judgment is correct. The objection as to the limitation, it is said, is not presented in the record, and it is not considered.

No. 78. *John S. Wills et al., plaintiffs in error, v. Horace B. Clafin et al.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Davis delivered the opinion of the court, affirming the judgment of the said court, with

costs and interest. This was a suit by Claflin & Co. as assignees of certain promissory notes against the plaintiffs in error, as assignors on their contract of assignment under the Illinois statute, which makes them liable if due diligence is used as against the maker in case a suit against him would be availing, and he is within the jurisdiction. On the trial it was observed that the makers had been adjudicated bankrupts in Wisconsin, and that they were insolvent when the notes became due. Such evidence was received against the objection of the assignors, the court holding it admissible under a general declaration of insolvency, and the ruling is here affirmed.

No. 61. *The Western Union Telegraph Co., appellant, v. The Western and Atlantic Railroad Company.* Appeal from the Circuit Court of the United States for the Northern District of Georgia. Mr. Justice Miller delivered the opinion of the court, reversing the decree of the said court, with costs, and remanding the cause for further proceedings in conformity with the opinion of this court; dissenting, Mr. Justice Field. This was a contest concerning a line of telegraph along the road of the railroad company which it holds under the State of Georgia. The state claimed to have purchased the line and its appurtenances from the telegraph company, and averred ownership. The telegraph company claimed that the contract was one of lease only, and the question was of the proper construction of the contract. The court below sustained the position of the state, dismissing the bill. This court holds that the state did not purchase, but that the contract was for the use of the line, its batteries, &c., the ownership remaining in the telegraph company. The defendant company is held to be concluded by the rights of the state, under which it holds, and can use the property only as the state was entitled to use it under the contract, and so long as the road gets the benefit of the contract by the use of the wire, &c., it must abide also by the terms of the contract in other respects. Decree reversed, with directions to refer the case to a master, to state an account on the terms of the contract between the state and the telegraph company, and between the complainant and defendant for the time the defendant has used the wire put up under the contract, and to render a decree for that amount.

No. 126. *John Forsythe, appellant, v. Mark Kimball, assignee, &c.* Appeal from the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Swayne delivered the opinion of the court, affirming the decree of the said court, with costs. This was the affirmance of the decree of the circuit court refusing Forsythe a set-off of certain indebtedness due the Mutual Security Insurance Company against an alleged indebtedness of the company due to him on policies of insurance, on the ground that the indebtedness was not individual.

No. 123. *Charles Stott et al., plaintiffs in error, v. William Rutherford.* In error to the Supreme Court of the District of Columbia. Mr. Justice Swayne delivered the opinion of the court, reversing the judgment of the said court, with costs, and remanding the cause with directions to enter a judgment upon the verdict in favor of the plaintiffs in error. This was a suit brought on a lease made by Dr. Gurley and others representing a church extension committee. There was a verdict for the plaintiff at the trial, but the general term reversed the case and ordered a judgment for the defendant, on the ground that there was no authority for the lease, as it showed upon its face that the committee had no title to the premises. This court reverses that judgment, directing a judgment to be entered upon the verdict, holding that every reasonable presumption is to be made in favor of the validity of the lease, and that there is nothing in the recitals inconsistent with the holding of the legal title by the committee in trust to enable them the better to discharge their duties toward the property of the church. The act done presupposes the prior act necessary to give it validity, and it is a fair inference from the language used that the lessors had such an estate or title in trust as would warrant the giving of the lease, and would render it valid. According to the view below, it is said that the lessee could not only have occupied the premises without performing his covenants, but at the end of the term he could have held possession in defiance of the lessors. This would be contrary to reason, justice, and the law.

No. 730. *F. A. Otis & Co., plaintiffs in error, v. H. B. Cullum, receiver, &c.* In error to the Circuit Court of the United States for the District of Kansas. Mr. Justice Swayne delivered the opinion of the court, affirming the judgment of the said court, with costs. In this case the defendant in error is sued as the receiver of the First National Bank of Topeka, Kan., to recover the value of certain Topeka securities sold by the bank to the plaintiffs in error. The judgment below was that there could be no recovery as the plaintiffs purchased the securities of their own motion without representa-

tion of the bank. That judgment is here affirmed, the court remarking that the plaintiffs got exactly what they intended to buy and did buy without guaranty.

No. 64. *Thomas Püts, executor, &c., appellant, v. The River and Lake Shore Steamboat Line, owners of the Steamer Dove, &c.* Appeal from the Circuit Court of the United States for the Eastern District of Michigan. Mr. Justice Clifford delivered the opinion of the court, affirming the decree of the said court, with costs and interest. This is the affirmance of a decree below, holding that in a case of collision on the St. Clair River, in May, 1869, between the steamer Dove and the propeller Mayflower, the collision was wholly the fault of the propeller.

No. 892. *James and Squire Williams, appellants, v. The United States.* Appeal from the District Court of the United States for the District of California. Mr. Justice Clifford delivered the opinion of the court, affirming the decree of the said court. Some fifteen years ago the claimants obtained a judgment from the land commissioners confirming their title to the land known as the Arrogoda la Saguna, in Santa Cruz County, California, and in the proceeding the word "sites" was translated "league" instead of "place." Hence the title was for a league of land, &c., with a boundary given. They now petitioned to have the word corrected so as to give them "the place" known by the name stated without being limited to a league, claiming that the grant was for the entire place. The court held that the decision of the land commissioners was never legally transferred to the district court so as to give it jurisdiction of the case, and the claimants having acquiesced so long in the decree as made, were without legal remedy. This court affirm that decree, finding no error.

No. 611. *M. A. Zeller, widow, &c. et al., plaintiffs in error, v. E. E. Switzer.* In error to the Supreme Court of the State of Louisiana. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writ of error, with costs. It is announced in a brief opinion that the decision below is not final.

No. 658. *Robert B. Bolling, plaintiff in error, v. Gustavus Lersner.* In error to the Supreme Court of Appeals of the State of Virginia. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writ of error in this cause for want of jurisdiction, the record not disclosing that any federal question was actually decided below.

No. 798. *William Hill and Emily Hill, appellants, v. Brackett & Waite.* Appeal from the Circuit Court of the United States for the District of Iowa. Mr. Chief Justice Waite announced the decision of the court, affirming the decree of the said circuit court in this cause, with costs and interest. No opinion delivered.

No. 693. *Daniel Hand, plaintiff in error, v. Thomas C. Dunn, Comptroller, &c.* Mr. Chief Justice Waite announced the decision of the court, postponing the motion to dismiss this cause until it is reached upon the merits. No opinion delivered.

No. 211. *Frederick Robert et al., appellants, v. The Propeller Galatea, &c.* Mr. Chief Justice Waite announced the decision of the court, denying the motion for a commission to take further testimony in this cause. No opinion delivered.

No. 862. *The American Emigrant Company, appellant, v. Adams County.* Mr. Chief Justice Waite announced the decision of the court, granting the motion to reconsider this cause on payment of costs. No opinion delivered.

Monday, January 31.

No. 83. *J. Sherman Hall et al., plaintiffs in error, v. John Weare.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Strong delivered the opinion of the court, reversing the judgment of the said court, with costs, and remanding the cause with directions to award a new trial. Mr. Justice Davis did not sit during the argument of this cause, and took no part in the decision. In this case the court holds that where a draft is drawn by a bank for a stipulated consideration, which wholly fails, but afterward the bank realizes a partial consideration on other accounts between it and the drawee, it cannot plead failure of consideration to the draft when offered as a set-off; and, it is said, the bank cannot derive the benefit it received indirectly, and at the same time insist that it got nothing for its own draft.

No. 546. *Frederick J. Mayer and Seth Evans, assignees, &c. plaintiffs in error, v. Max Hellman, assignee, &c.* In error to the Circuit Court of the United States for the Southern District of Ohio. Mr. Justice Field delivered the opinion of the court, reversing the judgment of the said court, with costs, and remanding the cause for further proceedings, in conformity with the opinion of this court. In this case it is held by this court that an assignment by an insolvent debtor of his property to trustees, for the equal and common benefit of all his creditors, is not fraudulent; and when executed six months before pro-

ceedings in bankruptcy are taken against the debtor, is not assailable by the assignee in bankruptcy subsequently appointed; and the assignee is not entitled to the possession of the property from the trustees.

No. 105. *The Milwaukee & St. Paul Railway Co., plaintiff in error, v. Mary A. F. and D. D. Arms.* In error to the Circuit Court of the United States for the District of Iowa. Mr. Justice Davis delivered the opinion of the court, reversing the judgment of the said court, with costs, and remanding the cause, with directions to award a new trial. In this case Mrs. Arms was a passenger in a train of the company when it collided with an engine which was on the track, and the shock threw her forward, inflicting injuries for which she sued to recover. The evidence was that the train was running about fifteen miles per hour, and that the colliding engine was nearly or quite at rest, and that the damage done was only to the front of the two engines. The court charged the jury that if they found the servants of the company guilty of gross negligence they might give the petitioner exemplary damages. The result was a verdict for \$4,000, for which judgment was entered. It is here said that, while the proof of negligence was sufficient to enable the plaintiff to recover the damages she sustained, it was not of a character justifying punitive damages. In such cases the rule is said to be that the jury may not go beyond compensating the sufferer by the negligence alleged and give exemplary damages, unless the act causing the injury is done wilfully, or with such reckless indifference to the rights of others as is equivalent to intentional wrong.

No. 118. *The Western Union Telegraph Co., plaintiff in error, v. Charles Eyster.* In error to the Supreme Court of the Territory of Colorado. Mr. Justice Davis delivered the opinion of the court, reversing the judgment of the said supreme court, with costs, and remanding the cause, with directions to reverse the judgment of the district court of Arapahoe County, and to direct that court to award a new trial. This case is held to be disposed of by the case against the Milwaukee & St. Paul Railway Company decided to-day, and it is said that the evidence, in no view to be taken of it, established a case for exemplary damages. The omissions to give the public warning of the work in progress when putting up the wire was negligence, which entitled the plaintiff only to compensatory damages, as there was nothing to show that the omission was wilful.

No. 86. *Robert Dow, plaintiff in error, v. David Humbert et al.* In error to the Circuit Court of the United States for the Western District of Wisconsin. Mr. Justice Miller delivered the opinion of the court, affirming the judgment of the said court, with costs and interest. Dissenting, Mr. Justice Clifford and Mr. Justice Hunt. The defendants in error were sued for a neglect of duty as supervisors in refusing to place upon the tax list the amount of two judgments recovered against the town of Waldwick. The court below instructed the jury that the plaintiff was entitled to recover nominal damages, because he had not shown that he had received serious injuries by the neglect of duty alleged. This ruling is here affirmed, the court holding, in substance, that as the taxable property of the township remained still subject to the tax, and the right to the belief also remained, the plaintiff has suffered only the nominal damage he was permitted to recover. Mr. Justice Clifford dissented, holding that unless the plaintiff in such a case may recover more than nominal damages, their debts become valueless, as the same conduct by the supervisors may be repeated indefinitely, and the rule necessarily leads to practical repudiation.

Monday, February 7, 1876.

No. 65. *The Propeller Colorado, &c., appellants, v. Elon W. Hudson, owner, &c.* Appeal from the Circuit Court of the United States for the Eastern District of Michigan. Mr. Justice Clifford delivered the opinion of the court, affirming the decree of the said court, with costs and interest. This was a case of collision on Lake Huron in May, 1869, between the propeller and the bark, the latter and cargo proving a total loss. The decision is that the bark displayed the proper lights, blew her fog-horn as required by law, and steadily kept her course, and that in view of the whole case the presumption is that the steamer was in fault in not keeping out of the way, in obedience to the rule as to steam vessels in such cases.

No. 648. *The United States, appellants, v. William Allison.* Appeal from the Court of Claims. Mr. Chief Justice Waite delivered the opinion of the court, reversing the judgment of the said court of claims, and remanding the cause with directions to dismiss the petition. The claimant was an employee of the government printing office from June, 1866, to June, 1867, and recovered extra compensation under the joint resolution of February 28, 1867. It is here held that the superintendent of the government printing office, and his successor, the congressional printer, were both officers under the control and au-

thority of the two houses of Congress, and not in any sense officers under the interior department, and that the claimant is not therefore entitled to recover.

No. 545. *B. F. Potts, Governor, &c., et al., plaintiffs in error, v. William Chumasers and John A. Johnson.* In error to the Supreme Court of the Territory of Montana. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writ of error in this cause for want of jurisdiction. This was a contest as to the validity of certain proceedings having for their object the removal of the seat of government of the Territory from Helena to Virginia City, and the court decide that it is not a case involving money or the rights of the person under *habeas corpus*, and that this court is without jurisdiction.

No. 127. *Murie Romie et al., plaintiffs in error, v. Teresa Casanova.* In error to the Supreme Court of the State of California. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writ of error, with costs, there being no federal question.

No. 831. *Alexander T. Stewart et al., plaintiffs in error, v. Meyer Sonneborn.* Mr. Chief Justice Waite announced the decision of the court, granting the motion to reinstate this cause upon the payment of costs.

No. 120. *Alfred H. Clements, appellant, v. Joseph H. Machebauf et al.* Appeal from the Supreme Court of the Territory of Colorado. Mr. Justice Clifford delivered the opinion of the court, affirming the decree of the said court, with costs. The questions raised related to alleged fraud, and are of little interest.

No. 543. *Isabella McManus, administratrix, &c., plaintiff in error, v. C. D. O'Sullivan et al.* In error to the Supreme Court of the State of California. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writ of error, with costs, there being no federal question involved.

No. 754. *Elizabeth Mead et al., appellants, v. Daniel Pinyard.* Appeal from the Circuit Court of the United States for the Western District of Michigan. Mr. Justice Hunt delivered the opinion of the court, affirming the decree of the said court, with costs. The cause presented only questions of fact.

No. 440. *Daniel Webster, plaintiff in error, v. Clark W. Upton, assignee, &c.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Strong delivered the opinion of the court, affirming the judgment of the said court, with costs and interest. The leading assignment of error was that the court below erroneously ruled that an assignee of stock, or of a certificate of stock in an insurance company, is liable for future calls or assessments without an agreement or promise to pay. This, however, is not a fair statement of what the court did rule. The court instructed the jury, in effect, that the transferee of stock on the books of an insurance company, on which only twenty per cent. of its nominal value has been paid, is liable for calls for the unpaid portion made during his ownership, without proof of any express promise by him to pay such calls. This instruction, it is here held, was entirely correct. The capital stock of an insurance company, like that of any other business corporation, is a trust fund for the protection of its creditors or those who deal with it. Neither the stockholders nor their agents, the directors, can rightfully withhold any portion of the stock from the reach of those who have lawful claims against the company. And the stock thus held in trust is the whole stock, not merely that percentage of it which has been called in and paid.

No. 77. *Thomas A. Osborne et al., plaintiffs in error, v. The United States.* In error to the Circuit Court of the United States for the District of Kansas. Mr. Justice Field delivered the opinion of the court, affirming the judgment of the said court in all respects, except as to costs, and remanding the cause, with directions to modify the judgment as to the costs of the proceedings subsequent to the application of the petitioner, and that such costs be apportioned against the parties ordered to make restitution according to the respective amounts they are adjudged to restore. In this case the court held that the effect of a pardon is to restore to its recipient all rights of property lost by the offence pardoned, unless the property has by judicial process become vested in other persons, subject also to such other exceptions as are prescribed by the pardon itself; that until an order of distribution of the proceeds is made, in cases of confiscation, or where the proceeds are actually paid into the hands of the party entitled as informer to receive them, or into the treasury of the United States, they are within control of the court. And that no such vested right to the proceeds had accrued in this case so as to prevent the pardon from restoring them to the petitioners. The plaintiffs in error, who were officers of the court in the confiscation proceedings, and who are called upon to make restoration of that portion of the proceeds they obtained, have no standing in court to

assail this position. The United States acquiesce, and it is not for them to complain that the proceeds of the property adjudged forfeited are held subject to the further disposition of the court and possible restitution to the original owners. That is a matter that concerns only the United States. The decree is affirmed, except as to the costs of the proceedings subsequent to the presentation of the application of the petitioner. Those costs should be apportioned against the parties ordered to make restitution according to the respective amounts they are adjudged to restore, and as to them the decree must be modified.

Monday, February 14, 1876.

No. 132. *The Aetna Life Insurance Co., plaintiff in error, v. David France and Wife.* In error to the Circuit Court of the United States for the Eastern District of Pennsylvania. Mr. Justice Hunt delivered the opinion of the court, reversing the decision of said court, with costs, and remanding the said court, with directions to award a new trial. In this case the court reaffirmed the decision of the case of *Jeffries v. The Economical Insurance Company*, made last term, that the statements and declarations made in the application for a policy of insurance shall be true. This stipulation is not to be made as to important or material statements only, or to those supposed to be material, but as to all statements. The statements may not come up to the degree of warranties. They may not be representations even. Statements and declarations is the expression — what the applicant states and what he declares. If he makes any statement in the application it must be true; so of his declarations. A faithful performance of the agreement is made an express condition to the existence of a liability on the part of the company. In this cause it was claimed and is found that false declarations were made as to the age and physical condition of the applicant.

No. 608. *Wm. H. Hoover, assignee, plaintiff in error, v. Abraham Wise.* In error to the Supreme Court of the State of New York. Mr. Justice Hunt delivered the opinion of the court, affirming the judgment of the said court, with costs. Dissenting, Mr. Justice Miller, Mr. Justice Clifford, and Mr. Justice Bradley. This was an action by an assignee in bankruptcy to recover a sum of money collected from the bankrupt after several acts of bankruptcy. The claim was deposited with agents in New York by the creditors for collection. These agents sent the demand to agents or correspondents of their own in Nebraska, where the bankrupt resided. The Nebraska agents, when the collection was made, were aware of the bankruptcy of the debtor, but the agents of the firm in New York were not, and the assignee insisted that the knowledge of the Nebraska agents was the knowledge of the creditors. It is held that the Nebraska firm were the agents of the New York agents and not of the creditors; that their knowledge did not, therefore, charge the creditors with that knowledge. The general doctrine that the knowledge of the agent is the knowledge of the principal cannot be doubted, but it must be a knowledge acquired in the transaction of the business of the principal.

No. 539. *Marshall O. Roberts et al., surviving trustees, &c., appellants, v. The United States.* Appeal from the Court of Claims. Mr. Justice Bradley delivered the opinion of the court, reversing the judgment of the said court of claims, and remanding the cause for further proceedings in conformity with the judgment and opinion of this. Dissenting, Mr. Justice Swayne, Mr. Justice Davis, and Mr. Justice Strong. This was the reversal of a *pro forma* judgment of the court of claims to enable an appeal to this court. The claimants claimed under an alleged enlargement of a contract made with their principals in 1851 for carrying the mails between New York and various Southern ports, rendered necessary by the discovery of gold in California, which occasioned a demand for largely increased mail facilities. The post-office department was unwilling to stipulate for any fixed sum as additional compensation, but agreed with the plaintiffs that the service should be performed and the question of compensation be decreed by Congress. Subsequently in 1870, Congress referred the matter to the court of claims, to determine what was due under the rates of compensation which had governed the contracts. It is here held that the post-office department was authorized to enlarge the contract as the necessities of the service demanded it; that the labor was performed and should be paid for at the established rates per pound for the extra amount carried; that, as between private parties, there could be no doubt as to the liability for the extra service, and that the same rules should apply to the government. The amount of the claim is \$1,031,000.

No. 133. *Charles C. Smeltzer, plaintiff in error, v. Miles White.* In error to the Circuit Court of the United States for the District of Iowa. Mr. Justice Strong delivered the opinion of the court, affirming the judgment of the said court, with costs and interest.



No. 704. *The United States, appellants, v. The Corliss Steam Engine Co.* Appeal from the Court of Claims. Mr. Justice Field delivered the opinion of the court, affirming the judgment of the said court. In this case it is held that upon a final settlement between a contractor and a department of the government, where all the facts are known and fully understood by the parties, the settlement is equally binding upon the government as upon the contractor. Such settlement cannot be disregarded by the government, at all events without restoring to the contractor the status he occupied before the contract was made. Hence the claimant, having delivered to the proper officer of the navy department certain machinery and materials, and received a certificate for a certain sum in consideration therefor, after a full understanding of the facts, the settlement is a finality.

No. 134. *Christian S. Eyster, plaintiff in error, v. Thomas and James W. Gaff.* In error to the Supreme Court of the Territory of Colorado. Mr. Justice Miller delivered the opinion of the court, affirming the judgment of the said court, with costs. No. 557. *W. S. Gilman et al., appellants, v. The Illinois & Mississippi Telegraph Co.* Appeal from the Circuit Court of the United States for the District of Iowa. Mr. Justice Swayne delivered the opinion of the court, affirming the decree of the said court, with costs. These two cases were decided together. The opinion decides nothing of general interest.

No. 558. *H. Coykendall, garnishee, plaintiff in error, v. The Illinois & Mississippi Telegraph Co.* In error to the Circuit Court of the United States for the District of Iowa. Mr. Justice Swayne delivered the opinion of the court, affirming the judgment of the said court, with costs and interest.

No. 131. *Alex. M. Earle et al., appellants, v. Jas. H. McVeigh.* Appeal from the Circuit Court of the United States for the Eastern District of Virginia. Mr. Justice Clifford delivered the opinion of the court, affirming the decree of the circuit court, with costs. The principal question was as to what constituted a good service under the state act, the defendant being absent. The opinion follows the settled maxim, that a defendant's rights cannot be taken from him without a full and exact compliance with the law.

No. 645. *The United States, appellants, v. John M. Ashfield.* Appeal from the Court of Claims. Mr. Chief Justice Waite delivered the opinion of the court, reversing the judgment of the said court, and remanding the cause with directions to dismiss the petition. In this case the court held that the watchmen in the public reservations were employed under the executive branch of the government, and being so their compensation was reduced by the Act of 1869. Hence, as the complainant received all, if not more than he was entitled to, up to the time of this reduction, he was entitled to nothing further.

No. 129. *Porter G. Turner et al., appellants, v. Charles H. Ward et al.* Appeal from the Circuit Court of the United States for Eastern District of Michigan. Mr. Chief Justice Waite delivered the opinion of the court, affirming the decree of the said court, with costs. This case involved only a question of fact.

No. 812. *Chas. Rockhold, plaintiff in error, v. Thos. Rockhold et al.* In error to the Supreme Court of the State of Tennessee. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writ of error for want of jurisdiction.

No. 851. *Eliza W. Warfield, plaintiff in error, v. John Chas. Chaffee.* In error to the Supreme Court of the State of Louisiana. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writ of error for want of jurisdiction.

No. 388. *John L. Macauley et al., appellants, v. Chas. Clinton et al.* Mr. Chief Justice Waite announced the order of the court, granting the motion to advance this cause.

## DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

## ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & CO.  
 Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.  
 Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & CO.  
 Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.  
 Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.  
 Daily Reg. — *Daily Register*, New York, 303 Broadway.  
 Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.  
 Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.  
 Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.  
 Leg. Gaz. — *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.  
 Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.  
 Mo. West. Jur. — *Monthly Western Jurist*, Bloomington, Ill., T. F. TIPTON.  
 N. B. R. — *National Bankruptcy Register*, New York, McDIVITT, CAMPBELL & CO.  
 Pac. Law. Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGDARDUS.  
 Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.  
 W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.  
 West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & CO.

## ATTORNEY.

1. ACTION FOR PROFESSIONAL SERVICES. — EVIDENCE. — EMPLOYMENT OF ATTORNEY BY CORPORATION. — In an action by an attorney, for professional services, it is essential to a recovery that the value of the specific services rendered be proved: it is not enough to show the value of services generally.

Managing officers of corporations have power to employ attorneys without express delegations of power or formal resolutions to that effect. *Southgate v. At. & Pac. R. R. Co.*, S. C. Mo., Cent. L. J., March 2, 1876.

2. DISBARRAL. — IMPROPER ADVERTISING BY ATTORNEY. — An information charged that defendant had been guilty of improper conduct in causing false and fraudulent advertisements to be inserted in divers newspapers published in the United States, inviting "so-called" divorce business, and that he had for years caused to be inserted in the daily newspapers, published in Chicago, anonymous advertisements, specimens of which were incorporated in the information, one of which was of the purport following: "Divorces legally obtained without publicity and at small expense. Address P. O. Box 1037. This is the P. O. box advertised for the past seven years, and the owner has obtained five hundred and seventy-seven divorces during that time." The court being satisfied as to the facts, struck the name of defendant from its rolls. *People v. Goodrich*,<sup>1</sup> S. C. Ill., Chicago L. N., Feb. 12, 1876.

<sup>1</sup> Judge BREKEE writes as follows: "These advertisements are not only a libel upon the courts of justice of this state, but are false in themselves, and put forth to the public by one who would not place his name to them. No high-minded, honorable member of our noble profession, in this or any other state, so demeans himself, nor does any member of it, jealous of his own honor, and duly appreciating his relations to the profession and to the courts, so conduct himself. Look to the distinguished men who have adorned the bar, who have shed lustre upon the profession, — the Websters, Wirts, Pinckneys, Emmets, and in our own state, the Kaners, Cooks, Blackwells, Lockwoods, Walkers, and others without number who have passed away, who had their own honor and the honor of their profession in view, with ambition

stimulating them to win such trophies as are gladly awarded to well-earned merit. Were they ever concerned in such low, degrading efforts? Never. It is not denied, an attorney may make any one of the branches of the law a specialty, but he must not, in so doing and acting, use undignified means, or low, disgusting artifices, and, least of all, should not withhold his name to his advertisements, nor should they be false, or contain libel on the courts. No honorable, high-minded lawyer, alive to the dignity of his profession and emulous of its honors, could stoop so low as this defendant has. That he should embellish his papers, contrived in a spirit of barratry, with the emblem of Justice, is singularly inappropriate.

"We have no patience with one, who, bearing

## BANKRUPTCY.

1. **EXAMINATION OF BANKRUPT.** — A bankrupt who has fully submitted to examination has a right to be protected against unreasonable demands upon his time for further examination; and where ample opportunity has been afforded, and an examination already had is apparently full, unless it is made to appear that such examination was collusive, or in some material and specified particulars deficient, an application for further examination may properly be refused. *In re Frisbie*, D. C. U. S. Mich., 13 N. B. R. No. 8.

## COMMON CARRIER.

1. **LIABILITY OF CARRIER FOR INJURY TO HORSE BY PLUNGING INTO A STREAM. — ACT OF GOD.** — The common law liability of a carrier attaches to a contract for carriage to a place without the realm.

A loss occasioned by the act of God is a loss caused exclusively by a violent act of nature, such as a carrier could not possibly foresee or resist the effect of.

It lies upon a carrier to show that a loss for which he would otherwise be liable was occasioned by the act of God.

The plaintiff delivered to the defendant in London a mare to be carried by the defendant by steamer from London to Aberdeen, between which places the defendant advertised and habitually ran steamers. A storm arising during the voyage, the mare was so injured that she died. The jury found that the injury was caused partly by excessive bad weather, and partly by the fright and struggling of the mare, and they negatived all negligence on the part of the defendant. *Held*, that the defendant was liable, and a verdict having been entered for the defendant at the trial, a rule to enter a verdict for the plaintiff made absolute.

*Semble*, that all ship-owners carrying goods for hire are liable as common carriers in the absence of express stipulation to the contrary. *Nugent v. Smith*, Eng. C. P. Div., Albany L. J., March 11, 1876.

2. **SLEEPING-CAR COMPANY NOT LIABLE AS COMMON CARRIER.** — A traveller who was being transported by a railroad company, to whom he had paid a fare, took a berth in a sleeping-car attached to the train, but belonging to a different company, for which he paid an extra sum to the sleeping-car company. While asleep he was robbed of a large sum of money he carried in his pocket. *Held*, that the sleeping-car company was not liable, either as an innkeeper or as a common carrier. *Pullman Pal. Car Co. v. Smith*, S. C. Ill., Am. Law Reg., Feb. 1876.

## CONSTITUTIONAL LAW.

**THE FOURTEENTH AMENDMENT AND ENFORCEMENT ACT. — REFUSAL OF INN-KEEPER TO ACCOMMODATE TRAVELLER ON ACCOUNT OF COLOR.** — The Act of Congress of March 1, 1875, enacting that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land and water, theatres, and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, was a warranted exercise of the legislative power vested in Congress under the fourteenth amendment to the Constitution of the United States, which makes all persons born or naturalized in the United States, and subject to the jurisdiction thereof, citizens of the United States.

Where a clerk, being in charge of the business of receiving travellers in an inn, and of providing necessary and proper accommodations for them, refuses such accommodations to a person, a traveller, by reason of his color, he will be liable to indictment and punishment under the Act of March 1, 1875.<sup>1</sup> *U. S. v. Newcomer*, D. C. U. S. E. D. Pa., Leg. Gaz., March 10, 1876; Legal Int., March 10, 1876.

our license to practise law in our courts, has so shocked all sense of propriety, of professional decorum, and of respect to the court in which he practises. He is an unworthy member and must be disbarred. The objections made by the defendant, of want of jurisdiction in this court to entertain the case, the unconstitutionality of the law giving the jurisdiction, the right of a trial by jury on the information, are entitled to no weight. . . .

"In view of our duty, as imposed by the statute, and the defendant's rights as guaranteed him

by the Constitution and the laws, we are unable to see why this court has not, and should not have, the power to purge itself of all uncleanness which may be found in its cloisters, and ridding itself of any nuisance which may desecrate them.

"We are satisfied the defendant has dishonored the profession of the law, and his position as one of its ministers; and that he ought to be, and he is, from this time forth, disbarred." — EDITOR.

<sup>1</sup> The *Legal Intelligencer* states that this point was reserved. — EDITOR.

## CONTRACT.

**COMPENSATION BY BOTH BUYER AND SELLER.**—The policy of the law forbids that a person acting as the friend and confidential adviser of a purchaser should at the same time be secretly receiving compensation from the seller for effecting the sale; and a contract for such compensation is void. *Bollman v. Loomis*, S. C. Conn., Am. Law Reg., Feb. 1876.

See **HOMESTEAD.**

**CONVERSION.** See **DAMAGES.**

**CORPORATION.** See **ATTORNEY.**

## CRIMINAL LAW.

**"THE BABCOCK CASE."** Full text of Judge Dillon's charge to the jury. Cent. L. J., March 3, 1876.

## DAMAGES.

**DAMAGES FOR INVOLUNTARY CONVERSION.**—The measure of damages of trover for conversion by an involuntary trespasser is the market value of the property at the point where it is sold by the trespasser, less the amount expended in bringing it to market. Where, however, it is not sold, or the market value does not cover the expense, the measure of damages is its value when first taken, together with any profits that might be derived from its value in the ordinary market, with interest. So held, where timber was cut by mistake on another's land, made up, carried away, and sold. *Winchester v. Craig*, S. C. Mich., Cent. L. J., Feb. 18, 1876.

See **NEGLIGENCE.**

## ENFORCEMENT ACT.

See **CONSTITUTIONAL LAW.**

## EVIDENCE.

**INSANITY OF ANCESTORS.**—While it is competent to prove, in a question of the sanity of a testator, that his father, mother, or perhaps his ancestors in a more remote degree, or his brothers or sisters, were of unsound mind, such fact must be proven by a person speaking from his own personal knowledge and observation, and not merely from traditional or hearsay testimony. *Coughlin v. Poulson*, S. C. D. C., W. L. R., Feb. 23, 1876.

See **ATTORNEY.**

## FIXTURES.

**ATTACHMENT OF FIXTURES TO REALTY WITHOUT CONSENT OF THEIR OWNER.—REPLEVIN.**—An owner of personal property cannot, against his will, be deprived of the title to the same, by having it attached, without his consent, to the real estate of another, by a third person, where such personal property can be removed from such real estate without any great inconvenience, and without any substantial injury to the real estate. Whenever one person obtains the possession of the personal property of another, without the consent of the owner, and then, without any right which the law will recognize, asserts a claim to the property, inconsistent with the owner's right of property and right of possession, the possession of such person will immediately become illegal and wrongful, and no demand for the property will be required to be made by the owner before he commences an action of replevin for the recovery of the same, although the possessor thereof may ever so honestly entertain the belief that his claim to the property is both legal and just. *Shoemaker v. Simson*, S. C. Kansas, Cent. L. J., Feb. 25, 1876.

## HOMESTEAD.

AN ORAL AGREEMENT BY A MARRIED MAN for the conveyance of the homestead is void. *Barnett v. Mendenhall*,<sup>1</sup> S. C. Iowa, West. Jur., Feb. J876.

## INSANITY.

See DAMAGES.

## INSURANCE.

1. THE POLICY PROVIDED THAT IF THE PREMISES BECAME VACANT, and so remained without notice and consent of the company, it should be void.

Where the premises had been unoccupied for thirty-three days without notice and consent, but the insured was all the time endeavoring to obtain a tenant, held, that they did not remain unoccupied within the meaning of the policy. *Kelley v. Home Ins. Co.*, C. C. U. S. Kansas, Ins. L. J., Feb. 1876.

2. ASSIGNMENT OF POLICY. — MORTGAGEE. — PLEADINGS. — On a policy of insurance against loss by fire, under seal, issued to the owner of the property, in which the insurer covenants to make good unto the insured, his executors, administrators, or assigns, all such damage or loss as might happen, &c. The owner may sue in his own name, although it may be written on the face of the policy, "Loss, if any, payable to A B as mortgagee." The direction on the policy to pay to the mortgagee is not an assignment of the policy. Its legal effect is that of a direction in advance, as to the mode of payment, which, when made, is performance in the manner agreed to by the insured. Under such a direction, if assented to by the insurer, the person in whose favor the assignment is made acquires equitable rights which the insurer is bound to regard, but the contract with the insured is not thereby merged or extinguished. In an action on such a policy in the name of the insured, if the insurer has paid the insurance money to the mortgagee, he may plead such payment as performance, and the rights of the mortgagee can be protected, and the insurer obtain indemnity against a subsequent suit by the mortgagee by the payment of the money into court. *Martin v. Franklin Fire Ins. Co.*, S. C. N. J., 1b.

3. COVENANT BY LESSEE TO DELIVER PREMISES IN GOOD CONDITION. — EXPENSE OF REBUILDING, ETC. — A bill was filed by Edward Ely, the appellant, for the purpose of obtaining the benefit of the insurance upon the premises of which he was the tenant. David Ely, one of the appellees, leased the premises to appellant, the lease containing covenants on the part of the lessee that he had received the premises in good order and condition, that he would keep them in repair at his own expense, and at the end of the term would deliver the same up to his lessor in as good order and condition as when they were entered upon by him. The title to the property was in Mrs. Caroline D. Ely, wife of David J. Ely, who in her own name had procured policies of insurance on the building upon the premises leased. The building was destroyed by fire, and a new one erected by

<sup>1</sup> MILLER, C. J., delivering the opinion of the court, says: —

"Counsel for appellee argue that although a conveyance of land to which the grantor had no title would be void as a conveyance, yet he might make a valid and binding contract to procure a good title to the land to be made to his vendee, and that for a breach of such contract he would be liable in damages; and they urge that upon similar reasoning, the husband is liable upon his agreement to convey the homestead, although his deed, without the concurrence of the wife, would be invalid.

"In the first place, the learned counsel are mistaken in assuming that a contract for the conveyance of land to which the vendor has no title is of any greater validity or binding force than a deed of the land made by such person, with a covenant of seisin. In the case of the deed no title would pass, it is true; but if the grantor should subsequently acquire the title it would enure and pass to his grantee. And if he did not acquire the title,

an action on the covenant of seisin for damages would lie.

"In the next place a contract to convey, or procure a conveyance for land to which the vendor does not have title, is not declared invalid by any statute, nor is it contrary to public policy or invalid under the common law of the country. On the other hand, such contracts are valid and binding, and because they are so, actions for breaches thereof may be maintained.

"So also, where the vendor, being the owner of the land, makes a contract to convey the same, if not being or including the homestead, and his wife refuses to join in the conveyance or to release her inchoate right of dower in the premises, the contract to convey is a legal and valid one; and while the husband cannot convey so as to bar the wife's right of dower, it is lawful for him to undertake by his contract to procure her relinquishment of dower, and he may be sued for a breach of the contract."

But these doctrines, it is said, do not apply to a contract to convey the homestead. — EDITOR.

the tenant. *Held*, under the covenants in the lease, that the tenant must sustain the whole expense of rebuilding; that a court of equity could not impose upon the owner a portion of such cost; that the insurance money was as much the money of Mrs. Ely as that derived from any other source; that a tenant has no equity to compel his landlord to expend money received from an insurance office in rebuilding the premises destroyed, or to restrain the landlord from suing for the rent until the premises are rebuilt. *Ely v. Ely*, S. C. Ill., Chicago L. N., Feb. 12, 1876.

### LIBEL.

OFFICIAL COMMUNICATIONS, PASSING BETWEEN OFFICERS OF THE GOVERNMENT, are privileged from disclosure on the ground of public policy. Neither the sending of such an official communication, nor retaining a copy thereof, amounts to a publication within the meaning of that term as used in the law of libel. *Gardner v. Anderson*, C. C. U. S. Md., Pac. Law Rep., Feb. 22, 1876.

### LIMITATIONS.

See MARRIED WOMAN.

### MARRIED WOMAN.

MORTGAGE DURING COVERTURE FOR HUSBAND'S DEBTS. — LIMITATIONS. — PRESUMPTIONS. — The petitioner in 1820, then a married woman, joined with her husband in mortgaging for his debt a piece of land owned by her, soon after which she removed with her husband from the state, and they continued to reside out of the state until 1869, when he died. Immediately after the execution of the mortgage, C., a creditor of the husband, attached his life-interest as tenant by the curtesy in the land, and afterwards had it set off to him in part satisfaction of the judgment which he obtained. In 1822, C. purchased the mortgage interest, taking a quitclaim of the land from the mortgagee, and three months after he conveyed the land by a warranty deed to a purchaser, from whom by sundry conveyances the land came in different parcels to the respondents. The land was originally of little value, unfitted for cultivation or for building purposes, but the respondents had at great expense graded and erected houses and other buildings upon it. At the time C. made the conveyance he was in actual possession of the land, but it did not appear when he took possession, nor whether under his mortgage title or that derived from the levy of his execution. No interest upon the mortgage debt was ever paid by the petitioner or her husband, nor was any attention given by either of them to the property before his death. After his death, the petitioner inquired about the property and demanded possession, which being refused she brought a bill in equity to redeem. *Held*, 1. That if C. was to be regarded as having taken possession under the levy of his execution, the petitioner would not be barred by the statute of limitations. 2. But that, in the absence of any evidence on the subject, and after so great a lapse of time, the court would presume that he had abandoned his claim under the levy and had taken possession as mortgagee. 3. That his possession as mortgagee, and that of those deriving title from him, being adverse to the petitioner, she would be barred by the statute of limitations. (Two judges dissenting.)

A married woman who executes a mortgage of her land with her husband is not saved by her coverture from the running of the statute of limitations against her title in favor of the mortgagee. *Hanford v. Fitch*, S. C. Conn., Am. Law Reg., Feb. 1876.

### NEGLIGENCE.

CONSEQUENTIAL DAMAGES — REMOTENESS. Cattle of the plaintiffs were driven along a road across which were some sidings belonging to the defendants, when some trucks of defendants were negligently allowed to run down it, across the road, separating the cattle from the drovers, and frightening them so that some of them ran down the road, broke through an imperfect fence into an orchard, whence they strayed upon the defendants' railroad, and were killed by a passing train. *Held*, that the defendants were liable, and that the damage was not too remote; and that the imperfect construction of the orchard fence was no defence to the action. *Inesby v. L. & Y. R. W. Co.*, Ct. Q. B., Cent. L. J., March 8, 1876.

### PRESUMPTIONS.

See MARRIED WOMAN.

## PROXIMATE CAUSE.

**THE RULE FOR DETERMINING. — THE PROVINCE OF THE JURY. —** In all, or nearly all cases, the rule for determining what is a proximate cause is that the injury must be the natural and probable consequence of the negligence, and that this might and ought to have been foreseen under the surrounding circumstances. These are the circumstances of the particular case, and from the nature of the thing must be referred to the jury. All the court can do is to aid the jury by pointing to the relations of the facts. The jury must determine whether the original cause, that is the negligence, is, by continuous operation, so linked to each successive fact, as that all may be said to be one continuous operating succession of events, in which the first becomes naturally linked to the last, and to be its cause; and thus to be within the probable foresight of him whose negligence ran through the succession to the injury. In determining this relation, it is obvious we are not to be governed by abstractions, which, in theory only, cut off the succession. Abstractly each blade of grass or stalk of grain is distinct from every other; so one field may be separated from another by an ideal boundary, or a different ownership, or it may be by a real combustible division line. But we cannot say that therefore the succession fails. Here it is the province of the jury takes up the successive facts, and ascertains whether they are naturally and probably related to each other by a continuous sequence, or are broken off or separated by a new and independent cause. *Penn. R. R. Co. v. Hope*, S. C. Pa., Leg. Gaz., March 8, 1876.

## REMOVAL OF CAUSES.

**1. PRACTICE. — MISTAKE IN NOTICE OF REMOVAL. —** Where the notice of the motion for removal, which was served upon the plaintiff's attorney, stated that the removal was demanded under the Act of 1867, which was repealed: *Held*, that the right of removal does not depend upon the contents of the notice of the motion for removal, and the state court could not withhold the removal, if the existing law in regard to the petition, &c., was complied with. *Minnett v. Mil. & St. Paul R. R. Co.*, C. C. U. S. Minn., Chicago L. N., Feb. 19, 1876.

**2. BEFORE THE FINAL HEARING, as used in the acts concerning the removal of causes from the state to the federal courts, means before the "determination of the rights of the parties forever." *Ib.*<sup>1</sup>**

<sup>1</sup> Judge NELSON thus discusses this very important point: —

"The statute requires the petition to be filed before 'the trial or final hearing of the cause;' and it is urged that a trial on the merits prevents a removal of the case. 'The trial' mentioned in the act, in my opinion, means not *one trial* or *a trial*, but a determination of the rights of the parties forever. When a new trial was granted, the suit was in the same position that it would have been had no trial taken place. The first trial had been erroneous — it had not been in accordance with the law — and there had been no such examination of the rights involved as was contemplated by Congress in using the word 'trial.' Again, 'the trial' mentioned in the act means a final investigation of the rights involved in the court of original jurisdiction.

The terms 'the trial' and 'final hearing' are used by Congress as having a relative connection — a reciprocal meaning — the former applicable to actions of law, and the latter to equity cases. The word 'suit' embraces actions at law as well as equity cases, and the conjunction 'or' connecting the words 'the trial' and 'final hearing' is used, as it often is, where it is sought to give an explanation or definition of the same thing in different words. Such must be the true construction of the law, for it is hardly probable that a distinction would be made between actions at law and equity cases, which would present a strange anomaly as suggested by Mr. Justice Swayne, in *Ins. Co. v.*

*Dunn*, 19 Wall. 325, that 'in equity cases a final hearing only could take away the right of removal, while any trial, however interlocutory in its character, should have the same effect in an action of law.' To avoid this, the supreme judicial court of Massachusetts, in *Galpin v. Critchlow*, 13 Am. Law Reg. 137, N. S., construing the law of 1867, which used the language, 'before the final hearing or trial,' said the 'trial appropriately designated a trial by jury of an issue which will determine the facts in an action at law; and final hearing, in contradistinction to hearings upon interlocutory matters, the hearing of the cause upon its merits by a judge sitting in equity.' The supreme judicial court of New Hampshire, in *Whittier v. Hartford Insurance Company*, 14 Am. Law Reg. N. S. 421, agree to the decision in the Massachusetts case, and consider the reasoning in that applicable to the law as it appears in sec. 639, sub. 3.

"With great respect for these courts, I cannot agree to this interpretation of the statute. In equity practice the term *hearing* has a well defined meaning, viz.: 'That stage or proceeding in an equity cause which corresponds to a trial of a cause at law; the hearing of counsel upon the pleadings and proofs.' The qualifying adjective *final* makes this *hearing* one that absolutely ends the matter in dispute, and is explanatory of the words 'the trial.' This is certainly within the spirit of the law, and, in my opinion, within its letter." — ED-  
IRON.

## REPLEVIN.

See FIXTURES.

## TRUSTS.

**EXECUTION OF TRUST. — REVERSION OF LEGAL TITLE. — ASSIGNMENT IN TRUST.** — B. and R., insolvent merchants of New York, made an assignment in 1838 to B. and W. in trust for creditors; the creditors not being made parties thereto. Amongst the assigned assets was a judgment against one Egan, under which, in December, 1840, a sheriff's deed of a large body of lands in Wills County, 2,480 acres, including the premises in controversy, was issued to B. and R., the assignors, by quitclaim deed dated in 1841, but not acknowledged till September, 1842, and not recorded till 1844; they conveyed these lands to their assignees; the conveyance, which was otherwise in ordinary form, reciting generally the fact of the prior conveyance, which was otherwise in ordinary form, reciting generally the fact of the prior assignment, and purporting to be made to the grantees in their capacity as assignees. *Held, semble*, that such deed was virtually an ancillary or supplemental assignment, and the title derived under it substantially of the same nature as if the lands had been specifically embraced in the original deed of assignment.

Reaffirming the doctrine of *Reece v. Gibson*, 50 Ill. 404; *Harris v. Mills*, 28 Ib. 44; *Pollock v. Maison*, 41 Ib. 517: *Held*, that assignments in trust for creditors, although conveying an estate in fee in the ordinary terms, are yet *sui generis* in their nature, as made merely to secure debts; and, as in case of a mortgage or deed of trust to secure a single creditor, instead of the whole body of creditors, if the debt itself is extinguished by the statute of limitations, the trust itself expires, and the legal title vested in the trustee is executed in the beneficiary entitled thereto. *Hardin v. Osborne*, S. C. Ill., Chicago L. N., Feb. 26, 1876.

## WILL.

**PAPER IN THE FORM OF A BOND. —** A written instrument in the following words held under the laws of Pennsylvania to constitute a will: "Know all men by these presents, that I, James McCully, of Pittsburg, Pa., do order and direct my administrators or executors, in case of my death, to pay Robert D. Clark, the sum of seventy-five thousand dollars, as a token of my regard for him, and to commemorate the long friendship existing between us. Witness my hand and seal this 17th day of April, A. D. 1872. \$75,000. James McCully." [L. s.] *Frew v. Clark*,<sup>1</sup> S. C. Pa., Leg. Int., March 10, 1876.

<sup>1</sup> AGNEW, C. J., and SHARSWOOD and PAXSON, JJ., dissented. Judge PAXSON said: —

"This decision can hardly fail to startle not only the profession, but the community also. It is now the law of Pennsylvania, that when a man produces a will, written by himself, without subscribing witnesses, and wholly in his own favor, purporting to be signed by a wealthy old man, who is a stranger to his blood, he is not only a competent witness to sustain the will and prove the vital fact of its execution, but that proof is not required to

show that the paper was read over to the testator, or that he knew the character of the instrument he was signing; and that it may be sustained even where it appears affirmatively that it was not read over and explained to the testator, and that the paper itself was of such a character as to convey to the mind of an unlearned man, not even a suggestion of the real purport."

It is stated that the case will be reargued by direction of the court. — EDITOR.



## HIGH COURT OF JUSTICE, WESTMINSTER HALL, COMMON PLEAS DIVISION.

(From the Weekly Reporter.)

PAROL EVIDENCE.—WHEN ADMITTED TO CONTRADICT WRITTEN CONTRACT.

CLEVER *vs.* KIRKMAN.

Where a written document, purporting to contain the terms of an agreement for sale, duly signed by both parties, is admitted in evidence, it may be shown by parol that in fact no agreement for sale had ever been entered into by the parties.

ACTION to recover damages for breach of contract by which defendant agreed to sell plaintiff his business, premises, good-will, and stock in trade. The contract was in writing and signed by the parties, and purported to be an unconditional agreement to sell. The defendant pleaded *non assumpsit*, and on the trial he testified that he never had the slightest idea of selling his business to plaintiff; that the document in question was addressed to any substantial purchaser whom the plaintiff might find; and that it was directed to the plaintiff merely to show that he was defendant's agent, authorized to sell in his behalf.

ARCHIBALD, J. Parol evidence is not admissible to qualify or vary a written document, but it is to establish a contemporaneous agreement, postponing the date of the operation of a written agreement, which is in its terms apparently absolute. Surely, then, parol evidence is admissible to show that the document was never intended to operate as an agreement at all, and that the parties never accepted the document as the record of any contract. No doubt such evidence must be looked at most scrupulously, and the jury must be perfectly satisfied that what on the face of it is a valid, binding contract, was never so intended by the man who drew it up. But here the jury were satisfied of this; they found that the document was only handed to the plaintiff as being the terms upon which he might sell to any responsible purchaser, and I think they had ample grounds for their conclusion. Besides the defendant's denial, the plaintiff confessed that he was an architect and surveyor, and had not £60,000 in the world; yet if this were a contract, he was bound to pay down £60,000 for the mere good-will of the piano-forte business. Many other circumstances show that the plaintiff did not intend to purchase the concern himself, but only to find a purchaser. No doubt the defendant's language is somewhat unfortunate in this document, but we must take it now that he did not mean what he appears to say.

LINDLEY, J. Before the judge is bound to construe an agreement, there is a preliminary question necessary. Is it an agreement at all? If the jury say no, then there is nothing to construe. To determine this preliminary question, parol evidence as to the circumstances under which the paper was signed is admissible.

BRETT, J. There was in this action the strongest *prima facie* case made out by the plaintiff. There was no plea of fraud. The only issue was *non assumpsit*; and a written document was produced which entirely bore out the declaration. But then the defendant put in evidence (which was not objected to at the time) to show that he never intended the plaintiff to be the purchaser, but only an agent for sale. And if the plaintiff's story was correct, he undertook to pay £200,000 for property which he had never seen, much less valued. And moreover, he was certainly not in a position ever to raise such a sum of money. He must have known that he was never intended to be the purchaser; he takes this document away with him as showing the terms on which he is authorized to sell; he sees how incautiously it is worded, and takes advantage of this to sign his own name at the bottom so that it may appear to be a binding contract of sale to him. And it is said that this court cannot interfere to put a stop to this sort of conduct, because parol evidence is inadmissible to show that the defendant never intended to contract with the plaintiff; and because the court must construe the written contract according to law as it stands. But that is not so; there may be no contract in the writing for the court to construe. The whole thing may be a joke or a misunderstanding, although it appears drawn up as a formal binding agreement. Parol evidence is admissible to show that there never was, in fact, any agreement at all. This is what Chief Justice Erle

says in *Pym v. Campbell*, 6 E. & B. 370: "The distinction is between admitting parol evidence to vary an agreement, and to show that what purports to be an agreement has in truth never become so." *Rogers v. Hadley*, 2 H. & C. 227, is not so strong in its facts, but the same doctrine is as clearly laid down. So again in *Wake v. Harrop*, 6 H. & N. 768, the same law is laid down; while *Mackinnon's case*, L. R. 4 C. P. 784, is stronger than any. There the issue was on a plea of *non assumpsit* as here. No plea of fraud could be placed on the record, as the bill was held by a purchaser before maturity for value and without notice. But it was decided that Mr. Mackinnon was not liable though he had indorsed the bill, because he never intended to indorse a bill. He was induced to put his name to a paper because he was told it was a guarantee; his mind never went with his act; hence he never contracted, and the plea of *non assumpsit* was proved. That is precisely the case here. From this paper it would appear that the defendant had agreed to sell his business to the plaintiff on the terms mentioned. But he never did so agree. Parol evidence is not admissible to vary the terms of a written contract, but it is to show that no contract ever existed of which they were the terms.

*Rule dismissed with costs.*

#### NOTES OF NEW BOOKS.

MESSRS. HURD & HOUGHTON, New York, The Riverside Press, Cambridge, have in press and will publish in a few weeks an exhaustive *Treatise on Mortgages*, by L. A. Jones, Esq., of the Boston bar. The work will be in two volumes, and promises to be one of permanent value.

MESSRS. LITTLE & Co., of Albany, have ready *The Principles of the Law of Evidence, with Elementary Rules for conducting the Examination and Cross-examination of Witnesses*. By W. M. Best, A. M., LL. B., of Gray's Inn, Barrister at Law; in two volumes. First American from the fifth London edition, with Notes and References to American Cases, by H. G. Wood, Esq.

MESSRS. LITTLE, BROWN & Co. announce the following list: EWELL's *Leading and Select Cases on Infancy, Coverture, Idiocy, etc.*, with notes by M. D. Ewell, Esq.; a new edition of REDFIELD *On Wills*; a new edition, the fourth, of WASHBURN *On Real Property*; a new edition, the second, of SCHOULER *On Personal Property*; CURTIS *On Copyrights*; BISHOP's *Directions and Forms in Criminal Cases*; BIGELOW *On Fraud*; CHAPLIN *On the Criminal Law and Procedure of Massachusetts*; HITCHCOCK *On Judicial Sales in the United States*; DRAKE *On Jurisdiction*; LATHROP *On Damages*; *Cases Cited, Considered, Doubted, or Overruled by the Supreme Court of Massachusetts*; and a *Treatise on the Law of Copyright*, by E. S. Drone.

They also announce a *Treatise on Bankruptcy*, by Judge Lowell, of the Massachusetts District, the completion of which will be anxiously awaited.

MESSRS. KAY & Co., of Philadelphia, have in preparation new editions of KERR *On Receivers*, and MORRIS *On Replevin*.

MESSRS. JAMES COCKROFT & Co., of New York, have ready a treatise on *Questions of Law and Fact*, by J. C. Wells, Esq., a work of a very useful character relating chiefly to instructions to juries and bills of exception.

# THE AMERICAN LAW TIMES.

NEW SERIES. — MAY, 1876. — VOL. III., No. 5.

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## NOTES OF OPINIONS, DECISIONS, AND ORDERS

OF THE

### SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1875.

Monday, February 21, 1876.

No. 664. *James M. Townsend, appellant, v. Alfred Todd et al.* Appeal from the Circuit Court of the United States for the District of Connecticut. Opinion by Mr. Justice Hunt, affirming the decree below. In this case it is held that in the construction of the recording acts of a state, the federal courts will follow the constructions of the state court, if there has been a uniform course of decision.

No. 856. *John & J. K. Warren, plaintiffs in error, v. Sheridan Shook, late Collector, &c.* In error to the Circuit Court of the United States for the Southern District of New York. Mr. Justice Hunt delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. This cause involved a construction of the internal revenue acts imposing a tax upon sales made by brokers. It was contended by plaintiffs in error, that because they were licensed as bankers they were not liable to the duty of one twentieth of one per cent. upon sales made on their own account. To this view the court declines to assent. Judge Hunt says: "The intent of Congress to subject to taxation all sales made by those engaged in the business of brokers, is plain enough. When it was said (§ 99) 'that all brokers and bankers doing business as brokers shall be subject' to the duties specified, it was intended to encompass the entire class of persons engaged in the business of buying and selling stocks and coin. Brokers were included by name and by definition. Bankers would not so certainly be embraced by the definition given in section 79, subdivision one. To meet this possible exception, it was enacted, that when bankers should do the business of brokers, they should be subject to the duty specified. In this matter brokers technically, and bankers doing the business of brokers, were made liable to the duty. If the right to tax bankers upon sales made for themselves rested on the seventy-ninth section alone, a plausible argument could be made in the plaintiffs' favor, arising from the words 'except such as hold a license as a banker.' But when we read in section ninety-nine 'that all brokers and bankers doing business as brokers' shall be subject to the tax, and consider the statutory definition of a broker, the plausibility of the argument ceases."

No. 135. *William W. Lathrop, assignee, &c., appellant, v. Samuel & John Drake, Jr., executors, &c.* Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. Mr. Justice Bradley delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause for further proceedings, in conformity with the opinion and decree of this court. The question in this cause was whether an assignee in bankruptcy, without regard to the citizenship of the parties, could maintain a suit for the recovery of assets in a circuit court of the United States in any district other than that in which the decree of bankruptcy was made. The question was decided affirmatively.

No. 869. *Samuel B. Lower, Supervisor, &c., et al., plaintiffs in error, v. The United States, ex rel. George O. Marcy.* In error to the Circuit Court of the United States for

the Northern District of Illinois. Mr. Justice Davis delivered the opinion of the court, modifying the judgment of the said circuit court so as to direct the board to assemble at their next regular semi-annual meeting, and allow said judgment, and affirming the judgment in all other respects, with costs. This case involved the construction of certain statutes of Illinois concerning the auditing of judgments against municipal corporations, and the levy of taxes to pay them. It was held below that under existing laws the power of the court to compel an auditing and levy of taxes by mandamus was plenary. This view is affirmed, the judgment being modified to render it effectual.

No. 142. *William A. Stone, appellant, v. Ezra B. Towne, administrator.* Appeal from the Circuit Court of the United States for the Southern District of Mississippi. Mr. Justice Miller delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause with directions to dismiss the bill, the suit appearing to be groundless.

No. 866. *Edwin M. Lewis, trustee of Jay Cooke & Co., appellant, v. The United States.* Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. Mr. Justice Swayne delivered the opinion of the court, affirming the decree of the said circuit court. On the 26th of Nov., 1873, all the persons composing the firm of Jay Cooke & Co. were adjudicated bankrupts, which adjudication remains in full force, and which includes the seven American members of the house of Jay Cooke, McCulloch & Co. The other three partners of this latter firm not being bankrupt. Under the proceedings in bankruptcy, the defendant Lewis was appointed trustee of the estates of the bankrupts of the firm of Jay Cooke & Co., and as such received and held their several separate individual estates and assets and the estates and assets of the firm as well. The estates of the bankrupts proved too insufficient to pay all their indebtedness. Upon these facts this court holds that the United States, under the statutes, are entitled to priority of payment of their debt mentioned in the opinion, out of the separate estates of such members of the firm of Jay Cooke & Co. as were also members of the debtor firm of Jay Cooke, McCulloch & Co., and this proceeding was properly instituted to enforce it. That all claims of the United States are embraced in the statute, and the form of the indebtedness is immaterial. The opinion is published in *extenso* in Chicago L. N., April 1, 1876.

No. 125. *Henrietta S. Gould, executrix, &c., plaintiff in error, v. The Evansville & Crawfordsville Railroad Co.* In error to the Circuit Court of the United States for the District of Indiana. Mr. Justice Clifford delivered the opinion of the court affirming the judgment of the said circuit court, with costs. Dissenting, Mr. Justice Bradley. It is laid down in this case that where special pleading is still allowed, if the parties elect to submit to it they must be bound by the rules that govern it. The defendant having demurred, and the demurrer being sustained with leave to plaintiff to amend, and plaintiff having declined to amend, elected to file a replication, containing new matter, to which replication defendants demurred specially, setting up the judgment on the former demurrer as an estoppel, which demurrer last mentioned was also sustained, upon which judgment was entered and the present writ of error sued out. Plaintiffs in error came to this court with the following propositions: *First*, that a judgment on demurrer is not a bar to a subsequent action between the same parties for the same cause of action, unless the record of the former action shows that the demurrer extended to all the disputed facts involved in the second suit, nor unless the subsequent suit presents the same questions as those determined in the former suit. *Secondly*, they deny that a former judgment is, in any case, conclusive of any matter or thing involved in a subsequent controversy, even between the same parties for the same cause of action, except as to the precise point or points *actually* litigated and determined in the antecedent litigation. *Thirdly*, that the declaration in the former suit did not state facts sufficient to sustain the alleged cause of action, and that the present declaration fully supplies all the defects and deficiencies which existed in the said former declaration. All of which are here ruled against them. Published in *extenso* in Cent. L. J., March 17, 1876.

No. 143. *William C. Lobenstein, appellant, v. The United States.* Appeal from the Court of Claims. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgment of the said court of claims. A contract providing that a party should have all hides of cattle "slaughtered for" the Indians, is here held not to include the hides of cattle delivered to the Indians alive.

No. 527. *George D. Crary & Henry Pike, appellants, v. John Devlin.* In error to the Court of Appeals of the State of New York. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writ of error in this cause, with costs, upon the authority of *Boggs v. Mining Co.* 3 Wall. 304.

No. 622. *Charles K. Brown, &c., plaintiff in error, v. Frank S. Atwell, administrator, &c.* In error to the Supreme Court of the State of New York. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writ of error in the cause for the want of jurisdiction. This case approved the doctrine so often repeated that it is not enough that a federal question may have been argued; it must appear that it has been actually decided. This rule is here applied in connection with a controversy growing out of the assignment of a patent.

No. 928. *James S. Welch, appellant, v. John F. Cook et al.* Mr. Chief Justice Waite announced the decision of the court, denying the motion to advance this cause.

No. 113. *J. Young Scammon, appellant, v. Mark Kimball, assignee.* Mr. Chief Justice Waite announced the decision of the court, denying the motion to modify the judgment heretofore rendered in this cause.

No. 321. *The United States, appellants, v. Mary B. Haversham, executrix, &c.* Reversed and remanded per stipulation of counsel. Mr. Chief Justice Waite announced to the bar that after the argument of the cases assigned for Monday next the court will take a recess until Wednesday, the 15th of March next.

Monday, February 28, 1876.

No. 157. *Waller A. Haldeman et al., plaintiffs in error, v. The United States.* In error to the Circuit Court of the United States for the District of Kentucky. Mr. Justice Davis delivered the opinion of the court, affirming the judgment of the said circuit court. This was a suit on the official bond of Haldeman as surveyor of customs at Louisville. The defence was that a former action for the same cause had been discontinued on the payment of the costs by the defendants. It is held that such a judgment of dismissal, because the cause was not prosecuted, is equivalent to nothing further than the record of a nonsuit, and constitutes no bar to a subsequent action. To bar a further action there must be the adjudication or release of some right. There must be at least one trial of a right between parties before there can be an end of the controversy.

No. 584. *The Union Pacific Railroad Co., plaintiff in error, v. Samuel E. Hall & John W. Morse.* In error to the Circuit Court of the United States for the District of Iowa. Mr. Justice Strong delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. Dissenting, Mr. Justice Bradley. In this cause the court holds that Hall & Morse, residents of Council Bluffs, as citizens, bore sufficient interest to give them standing in court to demand the performance of its obligations by the company, and that it is the duty of the latter, under the acts of Congress, to operate its whole road as one connected, continuous line, and that the bridge over the Missouri River between Omaha and Council Bluffs is a part of the road, to be used in connection with and as a part of their entire line. It is said that, if Congress did not intend to require the construction of the road from the imaginary line in the middle of the river channel, which would be an impossibility, and which is the legal boundary of Iowa, the intention must have been that the initial point should be either on the Iowa or on the Nebraska shore, and if the Nebraska shore was intended, why was it not designated? It is impossible to give a satisfactory answer to the question by the court, as to the question why the Iowa boundary was designated if the eastern or the Iowa shore of the river was not intended to be the terminus of the road. The authority of the company to build the road to the Iowa shore was within itself power to build a bridge on the Missouri River. No express grant to bridge the river was needed, as whatever bridges were needed on the authorized line were as fully authorized as the line itself; all authority that was given to the company was as a railroad company and not as a bridge company. The bridge was to enable the road to connect with other roads, and it was to be built for no other's use. They were not allowed to charge rates of toll over it which they did not charge upon other portions of their line. The acts chartering the company manifest no intention to distinguish between the bridge over the Missouri River and other bridges on the line of the road if it is not a part of the road. Neither is any bridge between the Missouri and the western boundary of Nevada excepted, for the power to build bridges was given in the same words. Mr. Justice Bradley, dissenting, is of the opinion that the Missouri River is generally understood to be the western boundary of Iowa, and that the fair construction of the charter of the Union Pacific Company is that their road was to extend from that river westwardly.

No. 141. *John R. Shepley et al., trustees, &c., plaintiffs in error, v. John E. Cowan et al.* In error to the Supreme Court of the State of Missouri. Mr. Justice Field delivered the opinion of the court, affirming the decree of the said circuit court, with costs. In this

cause the following points are decided : (1.) Whenever, in the disposition of the public lands, any action is required to be taken by an officer of the land department, all proceedings tending to defeat such action are impliedly inhibited. Accordingly, where an act of Congress of 1812 directed a survey to be made of the out-boundary line of the village of Carondelet, in the State of Missouri, so as to include the commons claimed by its inhabitants, and a survey made did not embrace all the lands thus claimed, the lands omitted were reserved from sale until the approval of the survey by the land department, and the validity of the claim to the omitted lands was thus determined. (2.) Where a state seeks to select lands as a part of the grant to it by the eighth section of the act of Congress of September 4, 1841, and a settler seeks to acquire a right of preemption to the same lands, the party taking the first initiatory step, if the same is followed up to patent, acquires the better right to the premises. The patent relates back to the date of the initiatory act and cuts off all intervening claimants. (3.) The eighth section of the act of September 4, 1841, in authorizing the state to make selections of land, does not interfere with the operation of the other provisions of that act regulating the system of settlement and preemption. The two modes of acquiring title to land from the United States are not in conflict with each other. Both are to have full operation, that one controlling in a particular case under which the first initiatory step was had. (4.) Whilst, according to previous decisions of this court, no vested right in the public lands as *against the United States* is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all such cases the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right. (5.) Where a party has settled upon public land with a view to acquire a right of preemption, the land being open to settlement, his right thus initiated is not prejudiced by a refusal of the local land officers to receive his proofs of settlement, upon an erroneous opinion that the land is reserved from sale. (6.) The rulings of the land department on disputed questions of fact, made in a contested case as to the settlement and improvements of a preemption claimant, are not open to review by the courts, when collaterally assailed. (7.) The officers of the land department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands with a view to secure rights of preemption. If they err in the construction of the law applicable to any case, or if fraud is practised upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions. But for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department, and finally to the President.

No. 154. *The Republican River Bridge Co., plaintiff in error, v. The Kansas Pacific Railway Co.* In error to the Supreme Court of the State of Kansas. Mr. Justice Miller delivered the opinion of the court, affirming the judgment of the said supreme court, with costs. In this case it is decided that where a right is set up under an act of Congress in a state court, any matter of law found in the record decided by the highest court of the state bearing on the right to set up under the act of Congress may be reviewed here on the merits. The court decides that the joint resolution of July 26, 1866, grants to the railroad company certain lands of the Fort Riley Military Reservation for the purpose of a depot opposite Riley City, which right was contested by the Bridge Company.

No. 146. *Henry H. Raymond, plaintiff in error, v. Wm. M. Thomas.* In error to the Supreme Court of the State of South Carolina. Mr. Justice Swayne delivered the opinion of the court, affirming the judgment of the said supreme court, with costs. In this it is held that the War of the Rebellion terminated in South Carolina on the 2d of April, 1866, and that the military officers remaining in command there between that date and the return of the state to the Union had no authority, under the acts of March and July, 1867, to annul a decree of a court of equity of the state. Hence such an order, made by General Canby, was an arbitrary stretch of authority, and was properly disregarded by the court below. Published in *extenso* in Chicago L. N., April 8, 1876.

No. 139. *James L. D. Morrison et al., plaintiffs in error, v. Samuel Jackson.* No. 140. *Jas. L. D. Morrison et al., plaintiffs in error, v. W. H. Benton.* In error to the Circuit Court of United States for the Eastern District of Missouri. Mr. Justice Clifford delivered the opinions of the court, affirming the judgments of the said circuit court, with costs.

No. 159. *The Mutual Life Insurance Company of New York, plaintiff in error, v. C. S.*

*Jeffries, administrator, &c.* In error to the Circuit Court of the United States for the Eastern District of Missouri. Mr. Chief Justice Waite announced the decision of the court, reversing the judgment of the said circuit court in this cause, with costs, upon the authority of *Jeffries, administrator, &c., v. Economical Insurance Co.* 22 Wall. 47, and *Ætna Insurance Co. v. France*, decided at this term.

No. 158. *The Propellor John Taylor, appellants, v. The New Jersey Railroad & Transportation Co.* Appeal from the Circuit Court of the United States for the Southern District of New York. Mr. Chief Justice Waite announced the decision of the court, affirming the decree of the said circuit court, with costs.

No. 161. *The Connecticut Mutual Life Insurance Co., plaintiff in error, v. Louisa Coverston.* In error to the Circuit Court of the United States for the District of Kansas. Mr. Chief Justice Waite announced the decision of the court, affirming the judgment of the said circuit court, with costs.

Monday, March 20, 1876.

No. 147. *Wm. Barnes, plaintiff in error, v. The District of Columbia.* In error to the Supreme Court of the District of Columbia. Mr. Justice Hunt delivered the opinion of the court, reversing the judgment of the general term of said supreme court, with costs, and remanding the cause with directions to affirm the judgment of the special term upon the verdict.

No. 137. *Charles D. Maxwell, plaintiff in error, v. The District of Columbia.* No. 138. *Francis X. Dant, plaintiff in error, v. The District of Columbia.* In error to the Supreme Court of the District of Columbia. Mr. Justice Hunt delivered the opinions of the court, reversing the judgments of the said supreme court, with costs, and remanding the causes with directions to award a new trial. In these cases it was held that the old corporation of Washington was chargeable with the care of the public streets and responsible for their condition; that the municipality created under the act establishing a Board of Public Works succeeded to all the duties and responsibilities of the old corporation. The municipality is not relieved from responsibility by the fact that the Board of Public Works was assigned the immediate charge and direction of the work, or because the governor and certain other officers were appointed by the President. The judgments below are reversed, with directions to affirm the judgments of the special term upon the verdicts obtained. Dissenting, Justices Swayne, Field, Strong, and Bradley, on the ground stated by Mr. Justice Field, that the District of Columbia should not be held responsible for the neglect and omissions of officers whom it has no power to select or control.

No. 166. *Harvey Terry, plaintiff in error, v. Emily H. Tuhman.* In error to the Circuit Court of the United States for the Southern District of Georgia. Mr. Justice Hunt delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. The court affirms the judgments of the court in Georgia, dismissing the case, which was an action to make the stockholders of a bank personally liable for its circulating bills. Mr. Justice Hunt delivered the opinion.

No. 11. *Samuel N. Burbank, Tutor, &c., appellant, v. E. B. Bigelow et al.* Appeal from the Circuit Court of the United States for the District of Louisiana. Mr. Justice Bradley delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause with directions to proceed therein in conformity to law.

No. 104. *Myra Clarke Gaines, plaintiff in error, v. Jos Fuentes et al.* In error in the Supreme Court of the State of Louisiana. Mr. Justice Field delivered the opinion of the court, reversing the judgment of the said supreme court, with costs, and remanding the cause with directions to reverse the judgment of the second district court for the parish of Orleans, and to direct a transfer of the cause from that court to the circuit court of the United States for the District of Louisiana, pursuant to the application of the appellant. Dissenting, Mr. Justice Bradley, Mr. Justice Swayne, and Mr. Chief Justice Waite. In this case it was decided that the defendant, being a citizen of New York, under the Popular Prejudice Act of Congress of 1867, had the right to have the cause transferred to the circuit court of the United States, and that all proceedings in the state court after the motion to remove the cause were nullities, and that the subject matter of the suit is of no consequence upon such a motion. The opinion is published in *extenso* in Chicago L. N., April 18, 1876.

No. 164. *Elon Farnsworth et al., appellants, v. The Minnesota & Pacific Railroad Co. et al.* Appeal from the Circuit Court of the United States for the District of Minnesota. Mr. Justice Field delivered the opinion of the court, affirming the decree of the said circuit court, with costs.

No. 880. *John and Thomas Henderson, appellants, v. Wm. H. Wickham, Mayor, &c., of New York et al.* Appeal from the Circuit Court of the United States for the Southern District of New York. Mr. Justice Miller delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause with directions to enter a decree for an injunction, in conformity with the opinion of this court.

No. 633. *The Commissioners of Immigration, appellants, v. The North German Lloyd.* Appeal from the Circuit Court of the United States for the District of Louisiana. Mr. Justice Miller delivered the opinion of the court, affirming the decree of the said circuit court, with costs. Case No. 880 arises under the statutes of New York regulating emigration. The decision of the court, after an elaborate review of the case, is, that the legislation is in conflict with the Constitution of the United States, and therefore void. The court are of the opinion that this whole subject has been confided to Congress by the Constitution; that Congress can more appropriately and with more acceptance exercise it than any other body known to our laws, state or national; that by providing a system of laws in these matters applicable to all ports and all vessels, a serious question, which has long been matter of contest and complaint, may be effectually and satisfactorily settled. Whether, in the absence of such action by Congress, the states may by legislation protect themselves against actual paupers, vagrants, criminals, and diseased persons arriving in their territory from foreign countries, is not decided. The provisions of the New York statute which concern persons who, on inspection, are found to be of this class, is held to be not properly before the court, because the relief sought is to the part of the statute applicable to all passengers alike, and is the only relief which can be given on this bill. The decree is reversed and an injunction ordered. In case No. 633 the proper injunction having been granted, the decree is affirmed. The opinion appears *in extenso* in this issue of the Law Times Reports.

No. 478. *Chy Lung, plaintiff in error, v. J. H. Freeman et al.* In error to the Supreme Court of the State of California. Mr. Justice Miller delivered the opinion of the court, reversing the judgment of the said supreme court, with costs, and remanding the cause with instructions to enter an order discharging the prisoner from custody. This case presented the same general question as that decided in the foregoing case from New York, although the statute is different in providing that the commissioners shall inquire whether any passenger is a lunatic, idiotic, deaf, dumb, blind, crippled, or infirm, and is not accompanied by relatives able to support him, or is likely to become a public charge, or has been a pauper in any other country, or is, from sickness or disease existing either at the time of sailing or when arriving, a public charge, or likely soon to become so, or is a convicted criminal, or is a lewd or debauched woman, and required not to allow them to land without the execution of a bond in each case by the master, owner, or consignee of the ship against their becoming a public charge within two years. This law the opinion criticises at considerable length, citing cases of necessary exclusion under it, which would be of great hardship, one of which was that the deaf, dumb, and blind are excluded, though ever so rich, the same as if paupers. Another, that a woman who has repaired a past error by marriage, and who, with her children and husband, seeks to land may be excluded without submitting to certain requirements, because she was debauched by her husband before marriage. In any view of the case the law is held to be void because in conflict with the federal Constitution.

No. 162. *John W. Morsell et al. v. The First National Bank of Washington.* Appeal from the Supreme Court of the District of Columbia. Mr. Justice Swayne delivered the opinion of the court, reversing the decree of the said supreme court, with costs, and remanding the cause with directions to overrule the exceptions of the auditor's report, and to enter a decree in conformity with the opinion of this court. His case turned upon a construction of a statute of Maryland not of general interest.

No. 148. *Henrietta Hoffman, appellant, v. The John Hancock Mutual Life Insurance Co.* Appeal from the Circuit Court of the United States for the Northern District of Ohio. Mr. Justice Swayne delivered the opinion of the court, affirming the decree of the said circuit court, with costs. In this case the court hold that where a person insured by application to an insurance broker, who took as part payment of the premium a horse and a note, giving a receipt for the premium, subject to the ratification of the company, and this agent of the company refused to ratify the transaction, there was no contract. Such an arrangement did not bind the company unless expressly ratified.

No. 834. *Chester A. Arthur, Collector, &c., plaintiff in error, v. James P. Cumming et al.* In error to the Circuit Court of the United States for the Southern District of New York. Mr. Justice Swayne delivered the opinion of the court, affirming the deci-



sion of the said circuit court with costs and interest. It is decided that burlaps are subject only to a duty of 30 per cent. *ad valorem*, and are not to be considered as oilcloth foundations.

No. 857. *H. G. Angle, appellant, v. The Northwestern Mutual Life Insurance Co.* Appeal from the Circuit Court of the United States for the District of Iowa. Mr. Justice Clifford delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the case with directions to enter a decree in favor of the complainant. It is ruled in this case that while an agent may have authority to fill a blank space left in an instrument intrusted to him as agent, he cannot change the matter actually printed or written; his authority ends with his right to fill the spaces.

No. 155 and 156. *John A. Hall et al., plaintiffs in error, v. The United States.* In error to the Circuit Court of the United States for the District of Minnesota. Mr. Justice Clifford delivered the opinion of the court, affirming the judgments of the said circuit court, with costs.

No. 153. *The Board of County Commissioners, County of Laramie, appellant, v. The Boards of County Commissioners, Counties of Albany and Carbon.* Appeal from the Supreme Court of the Territory of Wyoming. Mr. Justice Clifford delivered the opinion of the court, affirming the decree of the said supreme court, with costs. The complainant county was organized under an act of the Legislature of Dakota, which repealed the prior act to create and establish that county. When organized the county was still a part of the territory, and embraced within its territorial limits the territory now comprising the counties of Laramie, Albany, and Carbon. Very heavy expenses were incurred by the county, which it is alleged were also incurred by the authorities of the county, during that period, which greatly augmented their indebtedness. Pending these embarrassments the legislature of the territory passed two acts on the same day, to wit, December 16, 1868, creating the counties of Albany and Carbon out of the western portion of the territory of the complainant county, reducing the area of that county more than two thirds; by the said acts, creating said new counties, fully two thirds of the wealth and taxable property previously existing in the old county were withdrawn from its jurisdiction, and its limits were reduced to less than one third of its former size, without any provision being made in either of said acts that the new counties, or either of them, should assume any proportion of the debt and liabilities which had been incurred for the welfare of the whole, before these acts were passed. Payment of the outstanding debt having been made by the complainant county, the present suit was instituted in her behalf to compel the new counties to contribute their just proportion towards such indebtedness. It is here held that the action cannot be maintained. Published in *extenso* in Albany L. J., April 1, 1876.

No. 149. *Henry H. Blease, appellant, v. Albert C. Garlington.* Appeal from the Circuit Court of the United States for the District of South Carolina. Mr. Chief Justice Waite delivered the opinion of the court, affirming the decree of the said circuit court, with costs and interest.

No. 171. *Albert Grant, plaintiff in error, v. Jay Cooke & Co.* No. 172. *Albert Grant, plaintiff in error, v. Wm. H. Rhawn.* In error to the Supreme Court of the District of Columbia. Mr. Chief Justice Waite announced the decision of the court, affirming the judgments of the said supreme court in these causes, with costs and interest.

No. 576. *David F. Barney, appellant, v. The Steamboat D. R. Martin, &c.* Appeal from the Circuit Court of the United States for the Eastern District of New York. Mr. Chief Justice Waite announced the decision of the court, dismissing the appeal in this cause, with costs.

No. 508. *Peter B. Amory, plaintiff in error, v. Samuel B. and James Amory, executors.* No. 509. *Peter B. Amory, plaintiff in error, v. Samuel B. and James Amory, executors.* Mr. Chief Justice Waite announced the decision of the court, denying the motions to advance or dismiss these causes.

No. 168. *H. N. Spencer, appellant, v. The United States.* Appeal from the Court of Claims. Mr. Chief Justice Waite announced the decision of the court, remanding the record in this cause to the said court of claims for further findings.

No. 684. *The State of Louisiana, ex rel. J. P. Macauley, plaintiff in error, v. Charles Clinton, Auditor, &c.* Mr. Chief Justice Waite announced the decision of the court, denying the motion to dismiss this cause.

## DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

## ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & CO.  
 Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.  
 Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & CO.  
 Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.  
 Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.  
 Daily Reg. — *Daily Register*, New York, 303 Broadway.  
 Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.  
 Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.  
 Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.  
 Leg. Gaz. — *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.  
 Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.  
 Mo. West. Jur. — *Monthly Western Jurist*, Bloomington, Ill., T. F. TIPTON.  
 N. B. R. — *National Bankruptcy Register*, New York, MCDIVITT, CAMPBELL & CO.  
 Pac. Law. Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGDARDUS.  
 Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.  
 W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.  
 West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & CO.

## BANKRUPTCY.

1. EXEMPTION WHERE PROPERTY HAS BEEN TAKEN UNDER EXECUTION. — A bankrupt is entitled to an exemption of his household furniture and other necessary articles, although they were taken under an execution prior to the commencement of the proceedings in bankruptcy. *In re Martin*, D. C. U. S. N. D. N. C., 13 N. B. R. No. 9.

2. CONSPIRACY. — CONSTRUCTION OF SEC. 5132. — Under the statutes (Rev. Stats., sections 5132, 5440), other persons than the bankrupt can conspire with the latter to commit the acts made criminal, under the seventh and tenth subdivisions, section 5132, of the Revised Statutes. *It seems* that under the criminal section of the Bankrupt Act (Rev. Stats., section 5132), one who procures and abets the person against whom the proceedings in bankruptcy are pending, to commit the acts therein made criminal, may be indicted, though not expressly referred to in the statute. *U. S. v. Bayer*, C. C. U. S. Minn., *Ib.*

3. A PROCEEDING TO FORECLOSE A MORTGAGE INSTITUTED IN A STATE COURT after the commencement of the proceedings in bankruptcy, without making the assignee of the mortgagor a party thereto, is valid as against all persons who are parties thereto. If the assignee does not seek to redeem mortgaged property, the mortgagee may proceed in a state court to foreclose the mortgage, and such a proceeding is not absolutely void. *Brown v. Gibbons*, S. C. Iowa, *Ib.*

## BILLS AND NOTES.

1. CHECK. — PRESENTATION OF. — DILIGENCE. — The plaintiff desiring to make a remittance to a creditor at a distance and there being no bank in the place where he lived, asked the defendant, who had an account with a banker in a neighboring city, to take the amount of him in bank bills and give him his check therefor, and the defendant, fully understanding the object, took the bank bills and gave the plaintiff his check upon the banker, payable to the plaintiff's order, the defendant the same day depositing the bills with the banker. The plaintiff at once indorsed the check to his creditor and sent it by the next mail. It was three days before the check reached the place where the banker resided and was presented for payment, at which time the banker had failed and payment was refused. The plaintiff having taken up the check sued the defendant thereon. *Held*, that the check was presented within a reasonable time in the circumstances, and that the defendant was liable. *Woodruff v. Plant*, S. C. Conn., *Am. Law Reg.*, March, 1876.

2. FRAUDULENT CHANGE MADE IN PROMISSORY NOTE. — Where a negotiable prom-

issory note was made payable upon a condition, and the condition was written below the note on the same piece of paper. *Held*, that the note and condition were parts of a single entire contract, and that the fraudulent removal of the condition by tearing the paper, was such a material alteration as rendered the note void in the hands of a *bond fide* holder. *Gerrish v. Glines*,<sup>1</sup> S. C. N. H., Cent. L. J., March 31, 1876.

3. PAYMENT OF NEGOTIABLE PAPER BEFORE DUE. — Payments of negotiable paper before it is due, and in the absence of such paper, are not made in due course of business, and the party so paying should be held to do so at his own risk. Therefore, the maker of negotiable paper is not discharged if, before the maturity of the paper, and after its transfer, even as collateral security, he makes payment to any person other than the real holder. And this is so although the maker may have no notice of such transfer at the time of making such payment. The case of *Vallerlien v. Howell*, 5 Sneed. 441, reviewed at length and overruled. *Gosling v. Griffin*, S. C. Tenn., Chicago L. N., March 25, 1876.

### CHECK.

See BILLS AND NOTES, 1.

### COMMON CARRIER.

1. STIPULATION FOR EXEMPTION FROM LIABILITY FOR NEGLIGENCE. — The defendants, a railroad company, claimed to be exempt from liability for an injury to a horse transported upon their road, by reason of a stipulation in the bill of lading that they were not to be liable for any one of certain specified injuries or causes of injury to any animal thus carried. The court charged the jury that they were still liable for any injury caused by want of ordinary care on their part. *Held*, that the charge was correct. A stipulation by a bailee for hire for exemption from the consequences of his own negligence has no validity. There may, however, be a valid stipulation for a degree of responsibility less than that imposed by law. Where a stipulation in such a case was open to a question as to whether it intended an exemption from all liability or only a limitation of the common law liability, and the judge charged the jury that it was void, but that the defendants would be liable only for want of ordinary care, it was held that the defendants were not injured by the charge of the judge that the stipulation was void, even if it were not so, since he held them only to the degree of liability to which they would have been held under any construction of it. *Welch v. B. & A. R. R. Co.*, S. C. Conn., Am. Law Reg., March, 1876.

2. MEASURE OF DAMAGE FOR BREACH OF CONTRACT BY CARRIER. — The plaintiff was a manufacturer of cattle spice, &c., with samples of which he was in the habit of attending agricultural shows. The defendants received samples of cattle spice, &c., from the plaintiff's agent on the show-ground of an agricultural cattle show to be forwarded to N., where another cattle show was about to be held, by a day named on the consignment note. The goods did not arrive at N. till the show was over. *Held*, that the plaintiff was entitled to recover damages for the loss of profit he would have gained on orders received through the exhibition of his samples at the show, and for his loss of time in waiting at N. for the goods to arrive. *Simpson v. London & N. W. Railway Co.*, High Ct. West. Hall, Q. B., Cent. L. J., March 31, 1876.

### CONTRACT.

See COMMON CARRIER, 1, 2; DAMAGES, 1, 2.

### COPYRIGHT.

FOREIGN DRAMATIC COMPOSITION. — MEMORIZATION. — A preliminary injunction was applied for to restrain the performance by the defendants of a play called "The Two Orphans." Upon the bill and affidavits the court found: *First*. That there has been no memorization of this play by the defendants or any body in their employ, which would entitle them, without authority from the complainants, to represent the play of "The Two Orphans" in this district. *Second*. That there has been no dedication by any voluntary act, which would prevent the complainants in this case from exclusively representing this play. *Third*. That the *prima facie* case made out by the bill has not been

<sup>1</sup> A very painstaking note accompanies the report of this case in which the numerous authorities that run counter to the opinion are presented. — EDITOR.

overcome by the affidavits which have been presented by the defendants; and thereupon the court awarded a preliminary injunction as asked. *Shook v. Rankin*,<sup>1</sup> C. C. U. S. Minn., Cent. L. J., March 31, 1876.

### DAMAGES.

1. MEASURE OF DAMAGES. — REFUSAL TO ACCEPT ARTICLE ORDERED TO BE MADE. — Where the plaintiff, in pursuance of an agreement with the defendant, furnished the materials and constructed a carriage for the defendant, in accordance with his order and directions, for which a stipulated price was to be paid, and the defendant refused to receive and pay for it when completed and tendered. *Held*, that in an action brought for that purpose, the plaintiff is entitled to recover the contract price and interest from the time the money should have been paid. *Shawhan v. Van Nest*, S. C. Ohio, Am. Law Reg., March, 1876.

2. CLAIM FOR. — CONVEYANCE OF PARTNERSHIP INTEREST. — A partnership having been formed between A and B on the 18th of August, 1862, for the working of a colliery and the sale of coal, and on the 21st of February, 1866, a proposition having been made by B to A for the sale to A of all B's interest in the colliery, and in "all the material, property, fixtures, machinery, tools, and engines thereto belonging, and all property real and personal therewith connected," and the proposition having been accepted and the firm dissolved. *Held*, that B's shares of damages recovered in an action brought by the firm against a railroad company for locating and constructing a road over the lands leased for the purposes of the colliery did not pass by B's conveyance to A. *Freck v. Blackiston*, S. C. Pa., Leg. Gazette, March 24, 1876.

See COMMON CARRIER, 2.

### INSURANCE.

1. POWER OF AGENT. — PAYMENT OF PREMIUM. — SURRENDER OF POLICY. — The evidence tended to show an agreement by which the insured surrendered his policy in the A. company to the agent for cancellation, and authorized him to obtain insurance in a good company, he agreeing to credit insured with return premium. The agent made

<sup>1</sup> Of the defence that there had been a *memorization* of the play the court writes as follows: "It has been claimed, and with some reason, that the presentation of the version of a play obtained by process of memory is an infringement of no rights, either of the author or of his assignees; and in a very early case, it will be found upon examination that Justice Buller decided in England, that where the version of the play had been obtained by frequent attendance upon its representation, and afterwards produced by the party, it was not an infringement upon the rights of the author, and an injunction was refused. It was refused upon this principle: That a court of justice cannot enjoin the memory of a man; that where a party by mere strength of memory was enabled to commit a play and all its parts, and afterwards write it out without any assistance from the original play itself, it was the exercise of memory alone, and a court would appear ridiculous in attempting to enjoin the memory of a man. It was regarded at the time as a novel precedent; still it has been undisturbed, and a case was decided I think in New York city upon that principle. See article by J. A. Morgan in *American Law Register*, April, 1876, where Lester Wallack commenced a suit against Barney Williams, some six or seven years ago. He produced upon the boards of his theatre the celebrated play of *Caste*, and a short time afterwards Barney Williams also produced the play of *Caste* in another theatre, much to the astonishment of Mr. Wallack, and of everybody else who were informed of the means by which Mr. Williams obtained possession of the play, and of his rights in the premises. Upon suit being instituted by Mr. Wallack, claiming under the common law right, and not under

any copyright, it appeared that the brother-in-law of Barney Williams, Mr. Florence, in his affidavit, testified that he had obtained possession of this play by a process of memory. From frequent attendance at the performance in Mr. Wallack's theatre, he had been enabled to obtain possession of the play, and had actually produced it; which seemed an extraordinary exertion of bare memory, as it was, undoubtedly, if true.

"When that affidavit was presented, the court in New York declined to grant an injunction, following the precedent laid down in the English case.

"Now, without discussing the question whether the right of property — the right of an author in his property — depends upon any peculiar process, which may be used in obtaining it from him without his voluntary act, I think that even assuming that a court of equity would not interfere in a case of that sort, this is not the mode in which the version used by defendants was obtained, according to the allegations of the answer. They do not claim that this version which is represented here was obtained by frequent attendance upon the play, and listening to it; but they aver that by familiarizing themselves with it when represented, they being leading actors in the representation, it was memorized. They were not listeners, they were not a portion of the audience, but were persons who had been engaged by the managers who brought out the play, and obtained all they knew by repeating it as actors.

"So far, therefore, as this defence is concerned, the facts do not bring it within the rule laid down by Justice Buller, even admitting that the decision is founded upon true principles of equity." — EDITOR.

application to the H. company, which was accepted. No specified rate was mentioned, and the premium was not paid either to the agent or the company. The agent knew the company's rates, and was accustomed to be charged for the premium, for which he gave credit to the insured. The agent was accustomed to take the surrender of policies and cancel them in the A. company. No return premium was paid. The agent neglected to cancel the policy or return it to the company, and after the fire the A. policy was taken by the plaintiff from the agent. The H. policy contained the usual clause against other insurance.

In an action against the H. company, *Held*, that the agent was authorized to apply to the H. company; his application was that of the insured, and its acceptance completed the contract; that the premium, by being credited, was constructively paid to the company; that if there was an agreement between the agent and insured, the surrender of the A. policy was a virtual cancellation; that the subsequent repossession of the policy may have been an assertion that it had not been surrendered, or simply a precautionary act, and was a question for the jury. *Train v. Holland Pur. Ins. Co.*, Ct. App. N. Y., Ins. L. J., March, 1876.

2. PLEADING. — PLEA OF CHANGE OF TITLE. — The plea "that a change took place in the title of the property" is defective for want of definiteness.

Nor does it help the case that the plea is in response to an allegation of insured similar in terms. *Clay, &c. Ins. Co. v. Wusterhausen*, S. C. Ill., lb.

3. WHERE TWO REPLICATIONS TO ONE PLEA WERE FILED without consent, but such consent was subsequently given after judgment by default, it will be presumed that the permission related back. *Ib.*

4. ALTERATIONS. — DIVISION OF BUILDING. — Where the policy contains no stipulations regarding alterations, the detachment of the central portion of a building, and its addition to one of the two ends, thereby making two structures, does not avoid the policy provided it does not increase the risk. *Dorn v. Germania Ins. Co.*, C. C. U. S. N. D. Ohio, lb.

5. LIFE POLICY. — SUICIDE. — INTEMPERANCE. — INSANITY. — The court states the law as laid down by the supreme court in such cases, stating when a recovery may be had, although the party insured takes his own life, and when not.

Self-destruction renders the policy void. The burden of proof is on the plaintiff to show such kind and degree of insanity as will relieve the act of that consequence.

The court instructed the jury, that if they found that the assured had impaired his health by intemperance, then the policy was void; that this was sufficient of itself to defeat a recovery. He agreed that he should not impair his health by intemperance, and if he broke that provision a recovery cannot be had on the policy.

If the mental condition, which would otherwise avoid the effect of the self-destruction clause, was produced by intemperance, the plaintiff cannot recover. Insanity induced by violation of one condition of the policy cannot be set up as an excuse for the violation of another condition. *Jarris v. Conn. Mut. Life Ins. Co.*, C. C. U. S. N. D. Ill., Chicago L. N., April 8, 1876.

## JOINT STOCK COMPANY.

See JURISDICTION.

## JURISDICTION.

JURISDICTION OF U. S. COURTS. — BILL BY JOINT STOCK COMPANY. — A bill filed in the United States circuit court for the Eastern District of Pennsylvania, by a joint stock company organized under the laws of the State of New York, against a corporation of Pennsylvania, averred that complainant was a joint stock association under the laws of New York, having the legal entity and powers therein provided. On demurrer for want of jurisdiction: *Held*, that such an averment did not import that complainant was a corporation, or that all its members were citizens of another state than Pennsylvania, and the demurrer was therefore sustained. *Dinsmore v. P. & R. R. R. Co.*,<sup>1</sup> C. C. U. S. E. D. Pa., Cent. L. J., March 10, 1876.

<sup>1</sup> The opinion in this case is by Judge MCKEN-  
NAN, who writes as follows:—

"It is true that the *Liverpool Insurance Co. v. Massachusetts*, 10 Wall. 566, may be regarded as  
advancing beyond the line of preceding decisions

in reference to the kind of association which may  
be treated as a body politic. But the only con-  
tested question in the case was, whether the plain-  
tiff in error, an association formed in England  
under a deed of settlement, and endowed by sev-

## MASTER AND SERVANT.

**NEGLIGENCE. — ASSISTING SERVANT WITH MASTER'S CONSENT.** — A person who, in a transaction of common interest, assists the servants of another with the master's consent, can recover against the master for injuries caused by the negligence of the servants. The defendants contracted to carry a heifer by train to Penrith station on the defendants' line. The plaintiff travelled by the same train, and, on arriving at Penrith, he, with the assent of the station-master, assisted to shut the horse-box, in which the heifer was, in order to hasten delivery, and while so doing was injured by the defendants' servants. *Held* (affirming the decision of the court of queen's bench), that the defendants were liable. *Wright v. London & N. W. Railway Co.*, Eng. Ct. of App., Albany L. J., April 8, 1876.

## MORTGAGE.

See **BANKRUPTCY**, 3.

## MUNICIPAL CORPORATION.

**1. CONTROL OVER STREETS. — RAILROAD CHARTER. — POLICE POWER OF CITY, ETC.** — A grant in a legislative charter of a railroad of a right to fix its terminus at a point within the limits of a municipal corporation, to be approved by the council, and the subsequent approval of the point of terminus by the council, will not be taken to constitute an irrevocable contract, or to deprive the corporation of its proper and legal control over

eral acts of parliament with various corporate faculties, was a foreign corporation, and so subject to a tax imposed upon its business by a law of the State of Massachusetts. The court, regarding it as endowed by law with all the essential faculties of a corporation, held that it must be treated as such within the meaning of the Massachusetts statute, notwithstanding a provision in the acts of parliament conferring special powers upon it, that they shall not be construed to incorporate it. But the suit was brought in a state court, and it was admitted that all the members of the company were citizens of Great Britain and New York, and there was no question in the case touching the sufficiency of any jurisdictional averment in the pleadings. The logical sequence of the decision, perhaps, is, that a joint stock association, upon which the laws of a state have impressed the essential character of a corporation, may sue and be sued as such in the federal courts, but it does not change the rule, established by a long series of decisions, requiring proper averments in the pleadings to show the jurisdiction of the court. Now it must be manifest in some form that the members of the association, in whose behalf the suit is brought, are citizens of another state than the State of Pennsylvania. There is no express averment in the bill to this effect. Can it be presumed from the averment that the association suing was 'formed in the State of New York by certain written articles, duly executed by the parties thereto, under the laws of the State of New York, and having the legal entity, powers, and immunities in said laws provided?' There is certainly no authoritative warrant for such a presumption. Observing the rule established by all the cases, this presumption could result only from the corporate character of the litigant, indicated by appropriate averments, or shown to be its distinctive condition by a public law of a state, which the court is bound to notice. The fundamental reason of the rule is, that the creation of a body politic by the law of a state, fixes its habitation exclusively in that state, and that, as it can have no exterior existence or recognition except by mere comity, the real parties to the controversy — its stockholders, described under their collective

name — may, for purposes of jurisdiction, be presumed to have the same residence.

Whether a corporation, expressly created by the laws of a state, could be treated as a citizen of the state by which it was chartered, within the meaning of the Constitution and the 11th section of the judiciary act, so that it might sue or be sued in federal courts, has been the subject of frequent and earnest contention in the supreme court. In the earlier cases, jurisdiction of a suit brought by a corporation was denied, unless it was averred in the pleadings, not only that the litigant was a corporation, created by a law of a state, and located and established within it, but also that its members were citizens of such state. *United States v. Deveaux*, 5 Cranch, 61. In more recent cases, it has been determined that no express averment need be made of the citizenship of the members of a corporation suitor, but that they shall be conclusively presumed to be citizens of the state by the laws of which the corporation is averred to have been created, and in which it is located. *Louisville R. R. Co. v. Letson*, 2 How. 497; *Marshall v. Baltimore & Ohio R. R. Co.* 16 How. 314; *Cockington Drawbridge Co. v. Shepherd*, 20 How. 233; *Ohio & Mississippi R. R. Co. v. Wheeler*, 1 Black, 297; *Paul v. Virginia*, 8 Wall. 168. But to warrant this presumption and so to give jurisdiction to the court, it has, in these cases, been deemed essential to aver that the corporate body, suing as such, was distinctively a corporation, so created by law. This precision of averment was expressly required in *Pennsylvania v. The Quicksilver Mining Co.* 10 Wall. 553, where the declaration described the defendant a 'body politic in the law of, and doing business in, the State of California,' and the court say: 'And the question in this case is, whether it is sufficiently disclosed in the declaration that this suit is brought against a citizen of California; and this turns upon another question, and that is, whether the averment there imports that the defendant is a corporation created by the laws of that state; for unless it is, it does not partake of the character of a citizen within the meaning of the cases on that subject,' and the averment was held to be insufficient." — **EDITOR.**

the use of its streets, unless such is the effect of an express grant or a necessary implication from the charter.

It is within the ordinary and implied powers of a municipal corporation to regulate the kind of vehicles and the speed at which they may be used in traversing its streets. Such regulation is a part of the police power of the state, delegated to the municipal corporation as the custodian of its streets, and is not an exercise of eminent domain for which compensation is to be made to the parties affected. Where the terminus of a railroad, within the limits of a municipal corporation, was under its charter submitted to the council and approved, and subsequently the growth of the city changed the character of the street whereon the terminus was located, an ordinance prohibiting the use of steam-engines upon certain portions of the street, including the point where the terminus of the railroad was located, was held valid. *F. & P. R. R. Co. v. Richmond*, Ct. App. Va., Am. Law Reg., March, 1876.

2. **SUBSCRIPTION TO RAILROAD. — ULTRA VIRES.** — A special act authorized the commissioners of Alleghany County to subscribe for stock of a railroad corporation, payment therefor to be made in bonds of said county, bearing six per cent. interest, at par, which bonds the company was authorized to receive. The county subscribed for the stock, but upon the condition, which was agreed to by the directors of the railroad company, that the railroad company should pay six per cent. interest on the stock so taken by the county. The lessees of the railroad subsequently defaulted, whereby the company failed to pay interest to the bondholders. Upon a case stated (after a special verdict) between the county and the railroad company, to determine the liability of the latter for the payment of interest to the bondholders. *Held*, (1.) that the contract was unauthorized by the act, which contemplates that the county should stand in no other or better position than other stockholders of the company; (2.) that, the directors of the railroad having acted *ultra vires*, the company could repudiate the contract requiring it to pay to the bondholders preferred interest on the stock subscribed for by the county. *P. & S. R. R. Co. v. Alleghany Co.*, S. C. Pa., Cent. L. J., March 31, 1876.

### NEGLIGENCE.

**PROXIMATE AND REMOTE CAUSE. — ESCAPE OF FIRE FROM LOCOMOTIVE — CONTRIBUTORY NEGLIGENCE.** — In a suit for damages against a railroad company for the burning of a building of plaintiff, caused by the escape of sparks from defendant's locomotive, it appeared that the house was uncompleted and of frame, situated about one hundred feet from the track; that the carpenter had suffered shavings to accumulate about the house, and that the sparks were blown by a high wind from the locomotive into the dead grass adjoining the track, and from thence fire was communicated to the shavings and the building. *Held*, as follows: 1st. The escape of the fire from the engine was the proximate cause of the damage, and proof of its escape established a *prima facie* case of negligence which would render the company liable. But to rebut such presumption defendant might show its employment of careful and competent servants, and use of the best contrivances to prevent the escape of fire. Such facts being shown, it devolved upon plaintiff to prove actual negligence on the part of defendant. 2d. In accumulating combustible material plaintiff and defendant were equally negligent, and plaintiff could not recover on that score. *Coates v. Mo. & P. R. R. Co.*, S. C. Mo., Cent. L. J., March 13, 1876.

See **BILLS AND NOTES**, 1; **COMMON CARRIER**, 1; **MASTER AND SERVANT**.

### PARTNERSHIP.

See **DAMAGES**, 2.

### RAILROAD.

See **COMMON CARRIER**; **MUNICIPAL CORPORATION**.

### ULTRA VIRES.

See **MUNICIPAL CORPORATION**, 2.

## WILL.

**OF THE CAPACITY TO MAKE A WILL. — UNDUE INFLUENCE. — RATIFICATION, ETC.** — A will is not valid unless the testator not only intends of his own free will to make such a disposition of his property as it contains in its provisions, but is capable of knowing to whom he gives it, and whom he is depriving of it as heirs. It takes less capacity to make a will than it does to make a contract. The testator need not have as perfect and complete understanding as a person in sound and vigorous health in body and mind. Neither need he know the precise legal effect of the provisions of the will. In determining whether the testator was of sound mind, the jury may take into consideration all his sayings, doings, and sufferings, tending to show mental soundness or unsoundness. The burden of proving the conditions necessary to the making of a valid will rests with the proponents; but where undue influence is alleged, the burden of proving that lies with the contestants. Undue influence is more than mere persuasion. Direct proof can rarely be given of it, and in ascertaining whether it was exercised, all the acts of the person charged with using it, and the subsequent declarations of the testator, may be taken into consideration. The difference between the influence of a lawful wife and one who improperly occupies that relation is, that the law looks with suspicion upon influences of this latter nature; and the indulgence of an unchaste or illicit passion is evidence tending to establish the existence of both wrong and weakness. A will obtained through undue influence may be republished or ratified by subsequent acts and declarations, if the same be made when free from such restraint or influence. But a will executed where the testator did not possess sufficient mental capacity cannot be subsequently ratified by any acts of keeping, or any verbal declarations of approval. The statements of the party charged with undue influence of her power over the testator can only be put in evidence to contradict her. *Pierce v. Pierce*, C. C. 9th Circuit, Leg. Gaz., April 21, 1876.

## CIRCUIT COURT OF THE UNITED STATES. — EASTERN DISTRICT OF PENNSYLVANIA.

[APRIL, 1876.]

PRACTICE IN UNITED STATES COURTS. — REHEARING IN EQUITY CAUSES.

## REEVES v. KEYSTONE BRIDGE CO.

A rehearing in an equity cause in a federal court may be allowed by the court any time before final decree.

The proper practice is to file a petition for leave to present a supplemental bill and for a rehearing when the supplemental bill shall be ready to be heard. The petition should set forth fully the grounds upon which it is based and should contain all necessary allegations.

**MCKENNAN, J.** This is an application for a rehearing, to the end that the respondents may file an amended or supplemental answer, setting up the newly discovered matter stated in their petition. Its allowance is opposed upon three grounds: 1. That the decree heretofore entered in the cause is a final adjudication of the right of the complainant to his patent, to an injunction, and to damages, and that the court cannot, therefore, grant the prayer of the petition. 2. That the defendants have not exercised due diligence in discovering the new matter stated in their petition; and 3. That this new matter is immaterial, as it may affect the right of the complainant to a decree against the defendants.

1. There is no doubt that the decree heretofore rendered is determinate, as it stands, of the contested merits of the cause. It imports a hearing, consideration, and decision of the issues presented by the pleadings, and accordingly adjudges appropriate relief to the complainant. But it does not follow that it has passed beyond the power of the



court to modify or vacate it. A final decree only would have this effect after the expiration of the term at which it was entered. But this is not a final decree, because it does not end the cause. There still remains the ascertainment of profits and damages by a master, and a decree to be made after his report comes in, and not until then is the cause definitely disposed of. Indeed, there can be no doubt of the interlocutory character of the decree entered in this case. As such it is classified by Mr. Justice Story, in *Jenkins v. Eldridge*, 3 Story, 302; and in reference to exactly such a decree in *Barnard v. Gibson*, 7 How. 656, the supreme court say: "The decree in the case under consideration is not a final decree within the decisions of this court. The injunction prayed for was made perpetual, but there was a reference to a master to ascertain the damages by reason of the infringement," and it was, therefore, determined that an appeal would not lie from such a decree.

It is evidently such a decree that is contemplated by the eighty-eighth rule in equity. Until a decree is made from which an appeal will lie, it is the clear implication of the rule that the cause remains under the control of the court, and that a rehearing may be granted at any time before final decree.

But it remains to consider in what mode the rehearing prayed for must be applied for. In reference to this the practice seems to be well settled. It is by petition to the court for leave to file a supplemental bill, setting forth the newly discovered evidence, and for a rehearing of the cause at the time when the supplemental bill may be ready for hearing. This practice seems to have been long observed in England, and is said by Mr. Justice Story, in *Baker v. Whiting*, 1 Story, 233, to have been sanctioned by Chancellor Kent, in *Wiser v. Blachly*, 2 Johns. Ch. R. 488, and *Livingston v. Hubbs*, 3 Ib. 124; and by the circuit court in Rhode Island, in *Dexter v. Arnold*, 5 Mason, 303. In *Jenkins v. Eldridge*, *supra*, where a decree similar to the one entered here had been made, the same eminent judge thus strongly states the rule: "The present application, if maintainable at all, should properly, in its prayer, be for leave to file a supplemental bill, to bring forward the new evidence, and for a rehearing of the cause at the time when the supplemental bill should be ready for hearing. In my judgment, it would be against the settled principles and practice of courts of equity to allow the new evidence to be brought forward by a mere order on the petition, and, indeed, in this stage of the cause, wholly irregular to admit it, except upon a supplemental bill, where testimony could be taken on both sides to meet the new exigencies of the case."

The petition in this case does not contain the specific prayer which is required to attain the desired result, and, in its present form, cannot be granted. But as the argument upon it has been directed mainly to a discussion of its merits, as if it were allowable, it may be amended so as to make it conformable to the requirements of the practice. Its allowance, then, will depend upon the sufficiency of the two remaining grounds on which it is opposed.

2. It is incumbent on the defendants to satisfy the court that the omission to produce the evidence, which they now seek to make available, before the former hearing of the cause, is not due to any negligence on their part, but that they made diligent efforts to discover and obtain it. There is no doubt that it was entirely unknown to them until some time after that hearing. Their researches in the preparation of their defence are shown to have been extensive and thorough, and in quarters most likely to furnish all the information obtainable touching the subject matter of the suit; but they failed to disclose any trace of the existence of this new evidence. No negligence can be imputed to them on this score. Some time after the decree was entered, however, indefinite information of the probable existence of this evidence was acquired by them, and they have certainly prosecuted the pursuit of it with a zeal and industry which supply the full measure of any legal requirement. On the 27th of September last, it came to them in such shape that it could be used in this application, and it was promptly thereafter brought to the attention of the court.

Under these circumstances the defendants are not chargeable with any lack of reasonable diligence.

3. Is the new evidence material? It is not cumulative or corroborative of any of the original proofs, but sustains a distinct and independent relation to the fundamental question in the cause. I do not say that it is of such cogency as to entitle the defendants to a reversal of the decree heretofore made. That is to be determined hereafter, and I reserve any commitment whatever in reference to it. But I do say, that it is of such significance, touching the complainant's title to the invention described in his bill, as to

render it deserving of an answer, and to constitute it a fit subject of judgment in the cause, to the end that it may properly receive the consideration of the appellate tribunal.

If, therefore, the defendants' petition is amended, so as to embody an appropriate prayer, as hereinbefore indicated, it is ordered that the defendants have leave to file a supplemental bill, to bring forward the new evidence set forth in their petition, and that, when the proofs touching the same are completed, the said cause be reheard.

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### NOTES OF NEW BOOKS.

MESSRS. CALLAGHAN & Co., of Chicago, are about to issue *Erskine's Speeches* in four volumes. The first volume is ready.

HENRY C. LEA, eminent as a publisher of medical works, has published a new edition of *Taylor on Poisons*, a book of the greatest character and excellence. The new edition contains over a hundred illustrations.

THE BENCH AND BAR OF THE SOUTHWEST, by Hon. Henry S. Foote, has been issued by Messrs. Soule, Thomas & Wentworth, of St. Louis.

MESSRS. SUMNER WHITNEY & Co., of San Francisco, have recently published several very entertaining volumes, among them one by Mr. Irving Browne, entitled *Humorous Phases of the Law*, which is a pleasant and clever presentation of a great many good things about courts and lawyers. The publishers have displayed exceptional taste in the style and dress of the volume.

# THE AMERICAN LAW TIMES.

NEW SERIES. — JUNE, 1876. — VOL. III., No. 6.

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## NOTES OF OPINIONS, DECISIONS, AND ORDERS

OF THE

### SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1875.

*Monday, March 27, 1876.*

No. 825. *Town of Coloma, plaintiff in error, v. David W. Eaves.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Strong delivered the opinion of the court, affirming the judgment of the said circuit court in this cause, with costs and interest. Dissenting, Mr. Justice Miller, Mr. Justice Davis, and Mr. Justice Field. In this case the court affirms a judgment against the town on bonds issued in payment for a subscription to the capital stock of the Chicago and Rock Island Railroad Company, for which it received in return certificates of shares of the stock, holding the issue of the bonds to have been authorized by sufficient legislation, and intimating that a defence of want of authority to issue the bonds, while the town retains the shares of stock for which they were issued, is not strictly honest. The opinion in this cause was published in the *Am. L. T. Rep.* for May, 1876.

No. 53. *Town of Venice, plaintiff in error, v. Evander Murdock*; No. 54. *Town of Genoa, plaintiff in error, v. James O. Woodruff et al.*; No. 55. *Town of Venice, plaintiff in error, v. James O. Woodruff et al.*; No. 56. *Town of Venice, plaintiff in error, v. Wm. L. Watson*; and No. 90. *Town of Venice, plaintiff in error, v. Opher Edson.* In error to the Circuit Court of the United States for the Northern District of New York. Mr. Justice Strong delivered the opinion of the court, affirming the judgments of the said circuit court, with costs and interest. Dissenting, Mr. Justice Miller, Mr. Justice Davis, and Mr. Justice Field. This was also an affirmance of the validity of municipal bonds issued by the town of Venice in aid of the construction of a railroad which was to pass through the city of Auburn, and connecting Lake Ontario with the Susquehanna and Cayuga Railroad, or the New York and Erie Road, in pursuance of a law requiring the assent of two thirds of the tax-payers, the court holding the provisions of the law sufficiently complied with. Mr. Justice Strong delivered the opinion. Other smaller cases were disposed of by the decision in this, viz.: Nos. 54, 55, 56, and 90.

No. 160. *Wm. A. Cheatham & wife, plaintiffs in error, v. H. L. Norvell, Collector, &c.* In error to the Circuit Court of the United States for the Middle District of Tennessee. Mr. Justice Miller delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. Plaintiffs in error paid to defendant, who was collector of internal revenue, the sum of \$32,074, under protest, and brought their suit to recover the money, on the ground that the tax assessed as income tax for the year 1864 was illegal. The tax originally assessed amounted to \$99,726. From this assessment an appeal was taken to the Commissioner of Internal Revenue, who, on the 7th of October, 1867, rendered his decision setting aside that assessment and directing the local assessor to make a new one, and giving him directions as to the principles on which it should be made. On the 15th day of March, 1868, the new assessment was made at the sum of \$29,971.91. This, with interest and penalty, was paid at three different times, as follows: April 30, 1868, \$3,799; July 25, 1868, \$20,000; October 29, 1868, \$3,275. The present suit for the recovery of the money so paid was commenced by a writ

of summons, issued January 15, 1869. The cause being transferred from the state court in which it was commenced to the circuit court of the United States, that court, on the trial, instructed the jury that the 19th section of the Act of July 13, 1866, imposed a condition, without which the plaintiffs could not recover, and was not merely a statute of limitation. And as plaintiffs had not brought this suit within six months from the decision of the commissioner on their appeal, and had taken no appeal from the second assessment, made March 15, 1868, they had no right of action. This view is here affirmed.

No. 513. *The United States, plaintiffs, v. John W. Norton.* On a certificate of division in opinion between the judges of the Circuit Court of the United States for the Southern District of New York. Mr. Justice Swayne delivered the opinion of the court, answering the first question certified in the affirmative and the second in the negative. In this case Norton was indicted for the embezzlement at different times of money belonging to the Money Order Office of the New York Post-office, where he was a clerk. The plea was the bar of the statute of limitations. The indictment not being within two years of the offence, the government demurred, contending that as the moneys taken were a portion of the revenues of the United States, the indictment would be sustained under the law of 1804, which prescribes a limitation of five years in revenue cases, and that the limitation of the Act of 1790 was therefore immaterial. This court decides that the indictment cannot be tried under the Act of 1790 unless found within two years from the date of the offence, and that the indictment is not for a crime arising under the revenue laws within the Act of 1804. It is held that the Money Order Act does not indicate any purpose of revenue in view, its object being expressly to promote public convenience and greater security in sending money through the mails, and it being provided that all moneys transferred in the administration of the act shall be deemed and taken to be moneys in the treasury.

No. 179. *The New Schooner Maggie Cain, &c., plaintiff in error, v. Wm. M. Shakspeare.* In error to the Supreme Court of the State of Pennsylvania. Mr. Chief Justice Waite announced the decision of the court, affirming the decree of the said supreme court, with costs.

No. 926. *G. Bergner, plaintiff in error, v. Angelina Palethorp, trustee.* Mr. Chief Justice Waite announced the decision of the court, dismissing the writ of error for the want of jurisdiction.

Monday, April 3, 1876.

No. 192. *William Buchanan, plaintiff in error, v. Jerry B. Clarkson.* In error to the Supreme Court of the State of Missouri. Mr. Chief Justice Waite announced the decision of the court, affirming the judgment of the said supreme court, with costs.

Monday, April 10, 1876.

No. 178. *Blakeley Wilson, plaintiff in error, v. Peter Boyce*; No. 173. *Blakeley Wilson, plaintiff in error, v. L. McCrellis.* In error to the Circuit Court of the United States for the Eastern District of Missouri. Mr. Justice Hunt delivered the opinion of the court, affirming the judgments of the said circuit court in these causes, with costs. In these causes it is ruled that the only question involved has relation to the effect of the foreclosure of a prior statutory mortgage, as divesting title acquired after the execution of the mortgage which is not open to controversy. The point is the same, it is said, as was made in *Whitehead v. Vinyard*, 50 Mo. 30.

No. 609. *The Board of Liquidation, State of Louisiana, et al., appellants, v. H. S. McComb.* Appeal from the Circuit Court of the United States for the District of Louisiana. Mr. Justice Bradley delivered the opinion of the court, affirming the decree of the said circuit court, so far as it prohibits the funding of the debt due to the Louisiana Levee Company in the consolidated bonds issued or to be issued under the funding act of January 24, 1874, and reversing said decree as to so much thereof as prohibits the issue of any other bonds to the Louisiana Levee Company in liquidation of its debts. Costs to be paid by appellants. Mr. Justice Field did not sit in this cause, and took no part in the decision. In this cause it appeared that certain acts were passed by the Legislature of Louisiana providing for the funding of the state debt by the issue of consolidated bonds, the governor of the state and other officers being constituted a board of liquidation with power to issue the bonds. The acts specified that the new bonds should be exchanged by the board for valid outstanding bonds of the state and valid warrants of the auditor issued prior to the passage of the act (except warrants issued in payment

of constitutional officers of the state), at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and warrants; and that they should be used for no other purpose. Subsequently an act was passed authorizing the board to issue a portion of the above mentioned consolidated bonds to the Louisiana Levee Company in liquidation of a debt claimed to be due it under a contract made with the state in 1871, by which that company was to reconstruct and keep in repair the levees on the Mississippi River and its branches and outlets. The Act of 1871, in and by which this contract was made, had provided and set apart certain taxes to be levied and collected throughout the state, to meet the payments which would accrue to the company. But it seems that these taxes had failed to reach their destination, as a committee appointed by the Act of 1875 to investigate the subject reported that there was one million seven hundred thousand dollars still due the company, which had accrued prior to October, 1873, and which the act authorized the board of liquidation to pay in the said consolidated bonds. Upon the bill of appellee the court below granted an injunction restraining the board from funding the debt due the Levee Company in consolidated bonds or any other bonds whatever. This court affirms the decree below in so far as it prevents the funding of the debt in consolidated bonds, but reverses so much as prohibits the issue of other bonds.

Touching the amenability of the board to the writ the court say: "The objections to proceeding against state officers by mandamus or injunction are, first, that it is, in effect, proceeding against the state itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A state, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void."

No. 183. *H. and George A. Meyer, plaintiffs in error, v. Chester A. Arthur, Collector, &c.* In error to the Circuit Court of the United States for the Southern District of New York. Mr. Justice Bradley delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. This cause turned upon a question as to the existence of a custom affecting the construction of a revenue act (sec. 2 of the Act of June 6, 1872). The court held that the language of the statute was clear, and that nothing to modify it had been made out.

No. 43. *The Town of Concord, plaintiff in error, v. The Portsmouth Savings Bank.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Strong delivered the opinion of the court, reversing the judgment of the said circuit court, with costs, and remanding the cause, with directions to award a new trial. Suit was brought upon the coupons of certain municipal bonds, and payment resisted upon the ground that the Constitution of the state (Illinois) prohibited the issue of the bonds. It appeared that an undertaking to issue the bonds had been in part matured before the adoption of the constitutional provision relied on, but that the bonds had not been issued until after such provision had obtained. It is here held that the bonds are invalid.

No. 532. *The County of Moultrie, plaintiff in error, v. The Rockingham Ten Cents Savings Bank.* In error to the Circuit Court of the United States for the Southern District of Illinois. Mr. Justice Strong delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. Dissenting, Mr. Justice Miller, Mr. Justice Davis, and Mr. Justice Field. The opinions in this cause will appear in a future issue of the Am. L. T. Rep.

No. 848. *Joshua Converse, plaintiff in error, v. City of Fort Scott.* In error to the Circuit Court of the United States for the District of Kansas. Mr. Justice Strong delivered the opinion of the court, reversing the judgment of the said circuit court, with costs, and remanding the cause with directions to award a new trial. This cause turned upon the construction of special statutes, involving no question of general interest.

No. 167. *Enoch Totten, administrator, &c., appellant, v. The United States.* Appeal from the Court of Claims. Mr. Justice Field delivered the opinion of the court, affirm-

ing the judgment of the said court of claims. In this case the court hold that an action cannot be maintained in the court of claims upon a contract with the President for secret service to the government. The ground of the decision is that the contract for secret service seals the mouths of both parties. The service was to be a secret service, and if, upon such a contract, an action against the government may be maintained in the court of claims whenever an agent is dissatisfied with his compensation, the whole service in any case, and the manner of its discharge, may be exposed, to the serious detriment of the public. A secret service, with liability to publicity in such a way, would be impossible; and as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award.

No. 177. *The United States, appellants, v. John Landers*. Appeal from the Court of Claims. Mr. Justice Field delivered the opinion of the court, reversing the judgment of the said court of claims, and remanding the cause with directions to dismiss the petition. In this case the court held that an honorable discharge of a soldier from service does not restore to him pay and allowances forfeited by desertion, including bounty, as held by the court of claims, and the judgment of the court of claims to that effect is reversed.

No. 401. *The Leavenworth, Lawrence & Galveston Railroad Co., appellants, v. The United States*; No. 471. *The Missouri, Kansas & Texas Railroad Co., appellants, v. The United States*. Appeals from the Circuit Court of the United States for the District of Kansas. Mr. Justice Davis delivered the opinion of the court, affirming the decree of the said circuit court in these causes. Dissenting, Mr. Justice Field, Mr. Justice Swayne, and Mr. Justice Strong. In these cases the court decided that the Osage reservation, in Kansas, had never been granted to that State by Congress to aid in the construction of the railroad in question, and that the patents issued to the road by the governor of Kansas, in pursuance of certified lists furnished him by the Secretary of the Interior, must therefore be cancelled. The Secretary of the Interior having erred in the performance of his duty, his acts are void, for public officers can bind the government only within the scope of their lawful authority.

No. 165. *The Piedmont & Arlington Life Insurance Com., plaintiffs in error, v. Ashley W. Ewing, administrator, &c.* In error to the Circuit Court of the United States for the Western District of Missouri. Mr. Justice Miller delivered the opinion of the court, reversing the judgment of the said circuit court, with costs, and remanding the cause, with directions to award a new trial. In this cause it is ruled that where a policy of life insurance is delivered after death of the insured to a friend of the deceased, without knowledge on the part of the insurer of the death, to warrant a recovery in an action upon the policy the contract of insurance must be clearly made out. And, also, that the insured cannot be called upon to prove the truth of his reply to a general question in the application when put in issue against him.

No. 194. *Harvey Terry, appellant, v. The Commercial Bank of Alabama*. Appeal from the Circuit Court of the United States for the Southern District of Alabama. Mr. Justice Miller delivered the opinion of the court, remanding the cause to the said circuit court, with directions to modify the decree entered by the district court of the United States for the Southern District of Alabama, in conformity with the opinion of this court, and as so modified it is hereby affirmed. Costs to be paid by appellee. The defendant bank was wound up by a receiver, and a decree made that the bank, "its officers and stockholders, be, and they are hereby, forever discharged from all liability." The decree is here reversed, it appearing that by the charter the stockholders were liable, and that they had not been made parties to the proceedings.

No. 175. *Warren Hall, appellant, v. The United States*; No. 182. *The United States, appellants, v. Margaret Roach, executrix, &c.* Appeals from the Court of Claims. Mr. Justice Swayne delivered the opinion of the court, affirming the judgment of the said court of claims. In these cases the court decide that the claimant, having been a slave in Mississippi at the time he claims the cotton was conveyed to him by a contract with one Roach, he was incapable of making a contract or of holding title, and that the proceeds rightfully belong to the personal representatives of Roach, who was his master. It is also held that Hall was debarred from claiming that he was a free man, because he submitted to bondage and did not assert his freedom, as provided by the laws of the state.

No. 189. *Joseph Hobson & Jose M. Hurtado, plaintiffs in error, v. Daniel W. Lord*. In error to the Circuit Court of the United States for the Southern District of New York.

Mr. Justice Clifford delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. Dissenting, Mr. Justice Bradley.

No. 181. *The Steamship City of Washington, &c., appellants, v. Peter R. Baillie et al.* Appeal from the Circuit Court of the United States for the Eastern District of New York. Mr. Justice Clifford delivered the opinion of the court, affirming the decree of the said circuit court, with costs and interest.

No. 174. *Jilson P. Harrison, plaintiff in error, v. Esther B. Meyer, widow, &c.* In error to the Supreme Court of the State of Louisiana. Mr. Justice Clifford delivered the opinion of the court, affirming the judgment of the said supreme court, with costs. This cause went off on the construction of the state statute of limitations.

No. 635. *M. V. Cochran et al., appellants, v. H. A. Clarke et al.* Appeal from the Supreme Court of the District of Columbia. Mr. Chief Justice Waite announced the decision of the court, dismissing the appeal with costs.

No. 693. *Daniel Hand, plaintiff in error, v. Thomas C. Dunn, Comptroller General of the State of South Carolina.* Mr. Chief Justice Waite announced the decision of the court, denying the motion to advance this cause.

No. 738. *Erasmus D. Force, plaintiff in error, v. William N. McVeigh.* Mr. Chief Justice Waite announced the decision of the court, denying the motion to dismiss this cause.

Mr. Chief Justice Waite announced to the bar that no case will be called for argument after April 28, and the court will adjourn for the term on Monday, the 8th of May.

Monday, April 17, 1876.

No. 170. *James B. Pace, plaintiff in error, v. Rush Burgess, Collector, &c.* In error to the Circuit Court of the United States for the Eastern District of Virginia. Mr. Justice Bradley delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. In this case the action was to recover duties paid by Pace on packages of tobacco for export, on the ground that the tax was unconstitutional and void, the federal Constitution having declared that no tax or duty shall be laid on articles exported from any state. The court, however, find that the stamp was intended for no other purpose than to separate and identify the packages which the manufacturer intended to export, and thereby instead of taxing it, to relieve it from taxation to which all other tobacco was subjected. It was a means devised to prevent fraud and secure the faithful carrying out of the declared intent to export.

No. 184. *John Montgomery, Jr., assignee, &c., plaintiff in error, v. The Bucyrus Machine Works.* In error to the Circuit Court of the United States for the Western District of Missouri. Mr. Justice Davis delivered the opinion of the court, affirming the judgment of the said circuit court in this cause, with costs.

No. 701. *Henry B. Miller, Collector, &c., appellant, v. Morris K. Jessup et al.*; No. 702. *Isaac Taylor, Collector, &c., et al., appellants, v. James F. Secor & William Tracy*; No. 703. *Herman Lieb & H. B. Miller, Collector, &c., et al., appellants, v. Henry P. Kidder & Daniel O. Stone.* Appeals from the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Miller delivered the opinion of the court, reversing the decrees of the said circuit court, with costs, and remanding the causes, with directions to dissolve the injunctions and dismiss the bills. The opinion in these causes is published in the present issue of the L. T. Reports.

No. 186. *Robert A. Phillips, plaintiff in error, v. Charles W. Payne.* In error to the Supreme Court of the District of Columbia. Mr. Justice Swayne delivered the opinion of the court, affirming the judgment of the said supreme court, with costs. In this case the question was upon the validity of the retrocession of Alexandria to the State of Virginia. The court held the retrocession to have been a political act of the United States and the State of Virginia, concurred in by both governments since it was effected, Virginia all the while retaining unchallenged possession; that a *de facto* government, in undisputed possession, has the same rights as a government *de jure*, and its authority cannot be questioned in such a way. The plaintiff is estopped to raise the question, and the court is concluded by the action of the political department.

No. 196. *Sarah C. Savage, executrix, &c., appellant, v. The United States.* Appeal from the Court of Claims. Mr. Justice Clifford delivered the opinion of the court, affirming the judgment of the said court of claims in this cause. In this case the claim was for the difference between gold and bonds of the United States upon the surrender of certain bonds of the loan of 1861, taken by the plaintiff's husband. Savage insisted that he was entitled to gold; that Jay Cooke & Co., who negotiated the loan, advertised

that the bonds would be paid in gold. He, however, surrendered his bonds and accepted treasury notes, entering a protest. The court held that the voluntary acceptance of the treasury notes and the surrender of the bonds released the government, and that the protest is insufficient to qualify the effect of the waiver evidenced by the acceptance. Such a protest, being unauthorized by law, is a mere *ex parte* act, without legal efficacy. In this view of the case the question whether the bonds ought to be paid in gold did not arise, as the case made did not require its decision.

No. 151. *G. De Rosset Lamar, executor, &c., plaintiff in error, v. Albert G. Browne et al., special agents, &c.* In error to the Circuit Court of the United States for the District of Massachusetts. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. Dissenting, Mr. Justice Field. The decision in this cause is to the effect that property seized during the rebellion by officers of the United States was "enemy property," without regard to the *status* of the owner; and that United States officers making the seizures, if they acted within the scope of the authority conferred by act of Congress, cannot be personally held.

No. 210. *E. H. Wilson & S. V. Niles, executors, &c., et al., appellants, v. The Cairo & Fulton Railroad Co.* Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. Mr. Chief Justice Waite announced the decision of the court, affirming the decree of the said circuit court in this cause, with costs and interest.

## DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

### ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & Co.  
 Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.  
 Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & Co.  
 Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.  
 Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.  
 Daily Reg. — *Daily Register*, New York, 303 Broadway.  
 Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.  
 Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.  
 Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.  
 Leg. Gaz. — *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.  
 Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.  
 Mo. West. Jur. — *Monthly Western Jurist*, Bloomington, Ill., T. F. TIPTON.  
 N. B. R. — *National Bankruptcy Register*, New York, McDIVITT, CAMPBELL & Co.  
 Pac. Law. Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.  
 Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.  
 W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.  
 West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & Co.

### ADMINISTRATOR.

**PAYMENT TO ADMINISTRATOR WHERE SUPPOSED INTESTATE IS LIVING.**—In October, 1857, the intestate, James Divine, deposited with the defendant, a savings bank in the city of New York, the sum of \$485, and soon thereafter went to Cuba, with his wife, the present plaintiff, to reside, leaving his wife's mother, Isabella McNeil, residing in the city of New York. Neither James Divine nor his wife having returned to New York, in April, 1869, Mrs. McNeil applied to the surrogate of New York for letters of administration upon his estate, upon sufficient formal proof that he had died intestate, leaving assets in the county of New York, and that his wife was also dead, and that she was a creditor; and in May, 1869, the surrogate granted letters of administration to Mrs. McNeil upon his estate. The proceedings resulting in the letters of administration



complied with the statutes upon the subject, and were all regular in form. After letters were issued to her, she went to the savings bank, produced her letters, and demanded and received the deposit which had been made about twelve years before, with the accumulation of interest. In May, 1872, the plaintiff returned from Cuba to New York, and then for the first time learned what her mother had done; whereupon she applied to the surrogate for letters of administration upon her husband's estate, upon allegations and proof that he lived in Cuba until March, 1871, when he died intestate, and the surrogate revoked the letters which had been issued to Mrs. McNeil, and granted letters to the plaintiff, who had again married. The plaintiff then demanded the deposit of the defendant, with the accumulation of interest, and payment being refused, she brought this action. *Held*, that the defence of the first payment was valid. *Roderigas v. East River Savings Institution*,<sup>1</sup> Ct. Ap. N. Y., Am. Law Reg., April, 1876.

ADMIRALTY. See NEGLIGENCE, 2, 3, 4, 5.

ATTACHMENT. See BANKRUPTCY, 5.

### BANKRUPTCY.

1. COMPOSITION. — PAYMENT IN INDORSED NOTES under a resolution of composition is valid and may be confirmed. *In re Hurst*, C. C. U. S. E. D. Mich., 13 N. B. R. Nos. 10 and 11.

2. IBID. — A COMPOSITION WILL NOT BE EFFECTIVE to discharge a debtor unless the amount agreed upon is actually paid. *Ib.*

3. INDICTMENT UNDER SEC. 5132. — PROOFS. — INTENT. — Under an indictment based upon the ninth clause of the 44th section of the Bankrupt Law (Rev. Stat., sec. 5132), charging the defendant with obtaining goods under the false pretence of carrying on business, and dealing in the ordinary course of trade, it must be shown that the defendant represented to the person from whom the goods were obtained that he was so carrying on business, that the person was induced to part with his goods by reason of such representation, and that he was not so carrying on business. But this representation may be by acts and conduct as well as by words. Under the tenth clause of this section, it must be shown that the intent to defraud existed in the mind of the bankrupt against his creditors generally, and not against this particular creditor from whom the goods were obtained. *U. S. v. Penn*, C. C. U. S. So. D. Ohio, *Ib.*

4. CONSENT OF CREDITORS TO DISCHARGE. — INABILITY TO SECURE the consent of a majority in number and value of the creditors to a discharge, is no sufficient excuse for delay in applying therefor, when the time limited for making such application had elapsed before the adoption of the amendment reducing the number required to consent to a discharge. *In re Lowenstein*, C. C. U. S. E. D. Mo., *Ib.*

5. ATTACHMENT ISSUED WITHIN FOUR MONTHS AFTER COMMENCEMENT. — After a resolution of composition has been duly adopted and confirmed, the debtor may have an attachment quashed that has issued against him within four months before the commencement of the proceedings in bankruptcy. *Miller v. Mackenzie*, Ct. App. Md., *Ib.*

6. WHERE THERE ARE ASSETS OF A FIRM AND OF INDIVIDUAL MEMBERS THEREOF, each estate must pay its proportion of the entire expenses of administering the estate. Where there are partnership assets, the firm creditors cannot share in the individual estate. *In re Smith*, D. C. U. S. No. D. N. Y., *Ib.*

7. BURDEN OF PROOF IN INVOLUNTARY CASES. — In a case of involuntary bankruptcy, the burden of proof is on the petitioning creditor. *In re Or. Pub. Co.*, D. C. U. S. Or., *Ib.*

8. A DEBTOR IS INSOLVENT if his property, put up on reasonable notice for sale, where it exists under the circumstances of the case, will not bring cash enough to pay his debts. *Ib.*

9. PROOF BY PETITIONING CREDITOR. — A petitioning creditor is not required to make full and complete proof of the debtor's insolvency, but may offer proof tending to show his insolvency, and the debtor must then explain the evidence, if possible, for he is best acquainted with the condition of his own affairs. *Ib.*

10. EVIDENCE. — A DEFENCE WHICH HAS BEEN STRICKEN out of the case may be given in evidence as an admission. *Ib.*

<sup>1</sup> The late Judge Redfield, in a very able case as obviously against the weight of authority, combats the doctrine and decision of this *ity*. — EDITOR.

11. *IBID.* — PAPER FILED BY CORPORATION. — A paper sworn to and filed by an officer of a corporation is competent evidence against it, but is not conclusive. *Ib.*

12. *IBID.* — INTENT TO PREFER. — No particular or specific evidence of an intent to prefer is necessary when a payment is made by an insolvent debtor, for the act itself is sufficient evidence of the intent. *Ib.*

13. THE LAW WILL NOT PRESUME AN INTENT TO PREFER when the debtor is not aware of his insolvency, but it is incumbent on him to show it. *Ib.*

14. THE KNOWLEDGE OR MOTIVE OF THE PREFERRED CREDITOR is immaterial in an involuntary proceeding. *Ib.*

15. PAYMENT BY DEBTOR. — A DEBTOR WHO IS SOLVENT may pay any or all of his debts, although proceedings in bankruptcy are pending against him. *Ib.*

16. A VOLUNTARY CONTRIBUTION RECEIVED BY A DEBTOR does not constitute a debt due by him. *Ib.*

17. AGREEMENT TO MAKE CONTRIBUTION TO DEBTOR. A voluntary agreement between certain persons, to which the debtor is in no wise a party, to make a contribution to him, does not create an indebtedness to him. *Ib.*

18. A CORPORATION BY APPEARING AND ANSWERING A PETITION, thereby admits that it may be proceeded against in bankruptcy, and cannot afterwards object that the petition does not allege that it is a moneyed, business, or commercial corporation. *Ib.*

19. DEPOSITIONS. — PRACTICE. — A petition will not be dismissed, because the depositions in support thereof are defective; but the petitioning creditor, on motion, will be allowed to file supplemental depositions. When the depositions are defective, the order to show cause will be set aside, but a new order may be issued on supplemental depositions. *Cunningham v. Cady*, D. C. U. S. N. D. Ohio, *Ib.*

#### BILLS AND NOTES.

1. NOTE SIGNED BY PARTY AS SURETY. — PAROL EVIDENCE that one of two makers of a promissory note signed as surety, is competent for the purpose of enabling him to interpose the defence that he was discharged by an extension of time given to the principal debtor, with knowledge of the suretyship. *Hubbard v. Gurney*, Ct. App. N. Y., Albany L. J., April 15, 1876.

2. CERTIFICATION OF RAISED CHECK. — EFFECT OF CERTIFICATION. — A check drawn on plaintiff bank for \$27 was fraudulently raised to \$2,700. The check so altered was certified "as good" by the plaintiff bank, and defendant bank, which was not a party to the check, afterward paid it. Plaintiff bank then paid the amount to defendant bank. On discovering the alteration, plaintiff bank brought action against defendant to recover back the money paid. *Held*, that there could be no recovery. *Espy v. Bank of Cincinnati*, 18 Wall. 604; and *Marine National Bank v. National City Bank*, 59 N. Y. 67, distinguished.

The certification of a check extends to the amount thereof as well as to the signature and the funds of the drawer in bank. *La. National Bank v. Citizens' National Bank*, S. C. La., *Ib.*

#### BOND.

STOLEN BONDS PAYABLE TO BEARER HAVING PLACE OF PAYMENT LEFT BLANK. — Bonds were issued by a railroad company, by each of which it promised to pay to bearer 225 pounds sterling, in London, or one thousand dollars either in New York or New Orleans, with interest at eight per cent. The interest coupons attached to the bonds called for nine pounds sterling each, if payable in London, or forty dollars each if payable in New York or New Orleans. The face of the bond recited that the president of the company was authorized to fix by his indorsement the place of payment of both principal and interest. On the back of the bonds was a printed indorsement, signed with the genuine signature of the president, but the place of payment of the bonds was left blank. While in this condition the bonds were stolen, and were transferred to *bonâ fide* holders for value. *Held* (a), that such holders were not authorized to fill the blank left in the indorsement; (b), that the bonds were not commercial paper, and were not binding on the company in the hands of *bonâ fide* holders for value. *Jackson v. V. S. & T. R. R. Co.*, C. C. U. S. La., Chicago L. N., April 22, 1876.

CERTIFICATION. See *BILLS AND NOTES*, 2.

## CHAMPERTY.

**THE RULE IN MISSOURI.** — In Missouri a contract made between attorney and client, that the attorney shall prosecute a suit for the recovery of real or personal property, the attorney to receive a portion of the property recovered, as full compensation for his services, is valid and may be enforced. *Duke v. Harper*, S. C. Mo., Chicago L. N., April 22, 1876; Cent. L. J., May 5, 1876.

CHECK. See **BILLS AND NOTES**, 2.

## COMMON CARRIER.

**NEGLIGENCE. — PUNCTUALITY OF RAILWAY TRAINS. — MEASURE OF DAMAGES FOR DETENTION, ETC.** — Plaintiff having purchased a through ticket from L. to S., missed connection with the train at Y., by the train from L. being a few minutes late; he then employed a special train to convey him to S., and brought suit against the company for the extra expense. On the face of the ticket were these words: "Issued, subject to the company's regulations, and to the conditions in the time-tables," &c. *Held*, that the contract was to be gathered from the facts of plaintiff taking and defendants granting the ticket, from the ticket, the time-table, and the conditions; that the affirmative or explanatory conditions were part of the contract as well as the negative or restrictive. Hence, the railway company contracted that they would use every reasonable effort to secure punctuality, though they did not guarantee that the train would start and arrive precisely at the times stated. Although the company would not be liable for any mere delay or detention, yet, if such unpunctuality were so great or so unusual as to raise a presumption of negligence, it would be evidence of a breach of the contract to use every reasonable effort to secure punctuality; and, if unexplained, would entitle the plaintiff to a verdict against the railway company.

In an action for breach of contract to supply something to the plaintiff, the damages will be the difference between the value of that something that ought to have been supplied and the best attainable equivalent. Hence, a passenger who has taken a through ticket, but misses the train onwards through the neglect of the company, may, in certain circumstances, reasonably take a special train and charge the company with its cost. *Blanche v. London, &c. R. W. Co.*, High Ct. of Justice, Eng., Mo. West. Jur., May, 1876.

## CONSTITUTIONAL LAW.

**TRIAL BY JURY. — CHALLENGE FOR CAUSE.** — The territorial statute of Nevada, regulating proceedings in criminal cases, provided grounds of challenge of jurors: 1. "For the existence of a state of mind on the part of the juror in reference to the case, which in the exercise of a sound discretion on the part of the trier, leads to the inference that he will not act with entire impartiality, and which is known in this act as *actual bias*." 2. "Having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offence charged." By statute of the state, in amendment of the foregoing, these provisions were omitted, and in lieu thereof it was provided, that in the trial of a person accused of felony "from a list of thirty-six jurors, otherwise possessing the statutory qualifications, the state and the defendant shall challenge peremptorily one juror alternately, till each have taken twelve peremptory challenges, and the remaining twelve jurors shall be sworn to try the case. If the defendant refuse to take his peremptory challenges, the court shall take them for him." *Held*, that the amendatory act was in contravention of the Constitution of the state, which provides that "the right of trial by jury shall be secured to all and remain inviolate forever." *State v. McLearn*, S. C. Nev., Cent. L. J., April 14, 1876.

## CONTRACT.

**SUBSCRIPTION. — CONDITION PRECEDENT.** — Where a subscription is made to the capital stock of an insurance company, upon the condition that the same is not payable until a certain specified amount has been subscribed, such condition is a condition precedent, performance of which is essential before the company can enforce the payment of a note given for such subscription; nor will it avail the company that the condition is com-

plied with after suit is brought, but before the trial; the right to recover must exist at the time the action is commenced. *McCann v. Am. Cent. Ins. Co.*, S. C. Neb., West. Jur., April, 1876.

CORPORATION. See BANKRUPTCY, 11, 18.

#### CRIMINAL LAW.

**EVIDENCE.** — WHERE THE STATE BROUGHT A PAN OF MUD INTO COURT and it was placed in front of the jury, and it was proved by a witness that the mud was about as soft as the mud in the branch where he saw the track, and the prisoner was then called upon by the attorney general to put his foot in the mud. *Held*, that the bringing in of the pan of mud and the request of the attorney general were improper, and should not have been permitted by the court. *Stokes v. The State*, S. C. Tenn., Chicago L. N., April 29, 1876.

See BANKRUPTCY, 3.

#### DAMAGES.

**TROVER.** — MEASURE OF DAMAGES IN. — There is no fixed, definite measure of damages applicable in all cases of conversion of property; and while the general rule undoubtedly is, in ordinary cases, that the full value of the property at the time and place of its conversion, together with interest thereon, is the correct measure of damages in actions of trover, yet this rule yields when the facts require it, to the principle on which the rule itself rests, namely: that the recovery in trover ought to be commensurate, and only commensurate, with the injury, whether that injury be greater or less in extent than the full value of the property and interest. An action in trover was brought wherein it appeared that defendant had by mistake cut plaintiff's timber, worth \$1.50 per thousand feet in Michigan, and shipped it to Toledo, where it was sold at \$12 per thousand feet. *Held*, that plaintiff could only recover the value of the timber when cut, or the value at Toledo, less the necessary expense and labor in getting it to that market. *Winchester v. Craig*, S. C. Mich., Mo. West. Jur., May, 1876.

See COMMON CARRIER.

#### EVIDENCE.

1. **WHERE WITNESS HAS DIED.** — The examination of a witness before an examining court, where the witness has since died, is competent evidence in a trial upon indictment of the party for the same offence. *U. S. v. Penn*, C. C. U. S. So. D. Ohio, 13 N. B. R. Nos. 11 and 12.

2. **THE STATEMENTS OF A PARTY CHARGED WITH ABSCONDING**, made on his way from the place of his residence, as to his intention of returning, is competent evidence to disprove the charge. *Ib.*

See BANKRUPTCY, 10, 11, 12; CRIMINAL LAW.

EXECUTOR. See ADMINISTRATOR.

#### GAME LAWS.

**SERVING GAME AT RESTAURANT DURING PROHIBITED SEASON.** — GAME BROUGHT FROM ANOTHER STATE. — REGULATION OF COMMERCE. — Under an act for the preservation of game, which makes it unlawful for any person to purchase or have in possession certain kinds of game at certain seasons of the year, proof that the defendant, a restaurant keeper, caused game to be served to his customers, on a certain day within the prohibited period, will support a conviction, notwithstanding the fact that there was proof tending to show that the prairie chickens in question had been shipped from the State of Kansas.

A state law which prohibits the selling or keeping in one's possession of certain game within a certain period of the year, is valid, even when applied to game imported from another state, and in this application it is not such a regulation of commerce as belongs exclusively to Congress. *State v. Randolph*, Ct. App. St. Louis, Cent. L. J., March 24, 1876.

## GOOD-WILL.

**SALE OF GOOD-WILL. — SPECIFIC PERFORMANCE.** — By an agreement in writing, C. sold to M. his one fourth interest in the firm of J. C. & Co. Afterwards, M. sought to recover at law on the contract the interest so purchased. Whereupon, C. filed a bill in equity, asking that M. be restrained from prosecuting his action, and that the contract be so reformed as to show that M. purchased a one fourth interest only in the *good-will* of J. C. & Co. *Held*, 1. That a one fourth interest in the good-will of a commission business is not the subject of sale. 2. The good-will of a business is indivisible, and when one of four partners retires from a firm, the good-will in its entirety remains with the old partners. 3. A court of equity will not execute a contract for the sale of a good-will, nor will it enjoin proceedings at law under such an agreement. *Cassidy v. Melcalf*, Ct. App. St. Louis, Cent. L. J., April 28, 1876.

## INSURANCE.

1. **IRRELEVANT ANSWER WHERE ANSWERS ARE WARRANTIES.** — In answer to question whether the father had been afflicted with consumption, disease of the lungs, or insanity, plaintiff replied, "No. Father died from exposure in water, age 58." The answers were made warranties, and the father died before 30. *Held*, that the age was not inquired in the question; that this part of the answer was superfluous; that the warranty applies to such answers as are responsive and relevant; that the answer with regard to age was therefore a mere representation, and to constitute a defence must have been material as well as false. *Buel v. Mut. Life Ins. Co.*, C. C. U. S. N. D. Ohio, Ins. L. J., April, 1876.

2. **WAIVER OF FORFEITURE. — NON-PAYMENT OF PREMIUM. — ESTOPPEL.** — The policy was dated May 12, 1870, by which defendant insured plaintiff's testator against loss by fire on certain personal property for five years. The insured property was destroyed February 1, 1872. The cash premium, payable when the policy was issued, was not paid at that time, but plaintiff's testator gave his note therefor due January 1, 1871. He also gave the usual premium note, payable on call of the directors of the company. The note for the cash premium not being paid at maturity was sued, and judgment obtained thereon, a portion of which was paid before the loss. After the loss, and after the defendant had notice thereof, the balance of the judgment was paid to and accepted by the defendant without objection or reservation. January 19, 1871, the defendant's board of directors made an assessment on all the premium notes of the company including the premium note given by plaintiff's testator, and payment of such assessment on the note last mentioned was duly demanded, but it remained unpaid until after the loss. After that time the assessment was paid to and accepted by the defendant. December 11, 1871, the executive committee of the board of directors adopted the following resolution: "Resolved, that all policies upon which the assessment levied on the 19th day of January, 1871, are not paid before the 31st of December, 1871, be annulled on that day; and that such unpaid assessments be collected by law at once." Due notice of such resolution was immediately given to plaintiff's testator. *Held*, that receiving the unpaid balance of the cash premium after notice of the loss was a waiver of the default in paying the same, estopping the defendant from asserting that its liability on the policy was suspended when the loss occurred, and that the defendant was liable accordingly. *Joliffe v. Madison Mut. Ins. Co.*, S. C. Wisc., Ins. L. J., April, 1876.

## INTERNAL REVENUE.

**THE SALE OF LIQUOR TO ITS MEMBERS BY A CLUB OR ASSOCIATION OF PERSONS NOT INCORPORATED, COMBINING TOGETHER TO PROMOTE SOCIAL AND LITERARY OBJECTS, SUBJECTS IT TO TAX AS A RETAIL DEALER, AND RENDERS THE CLUB OR ANY MEMBER THEREOF CRIMINALLY RESPONSIBLE FOR THE FAILURE TO PAY SUCH TAX.** Any course of selling, though to a restricted class of persons and without a view to profit, is within the meaning of the statute. *U. S. v. Wutig*, D. C. U. S. Mass., Cent. L. J., April 28, 1876.

## MUNICIPAL CORPORATION. See NEGLIGENCE.

## NEGLECTANCE.

1. **LIABILITY OF MUNICIPAL CORPORATION. — FAILURE TO PROVIDE BARRIERS. —**

**RUNAWAY HORSE.** — The authorities of a municipal corporation permitted a road located near the edge of a precipice to remain unprovided with barriers. Plaintiff's horse, while being driven in the vicinity became frightened, and breaking away ran over the precipice and was killed. *Held*, that the neglect to erect proper barriers, not the running away of the horse, was the proximate cause, and that the city was liable. *Heg v. City of Philadelphia*, Leg. Gaz., April 14, 1876.

2. **THE OWNERS OF A VESSEL IN FLAMES TOWED BY A TUG**, and no longer in command of her own captain and crew, are not liable for injury done by her to another vessel, by the negligence of the captain of the tug; the said owners not having employed the tug, she being a tug whose regular business was the assistance of vessels in distress, and she having gone, of her own motion, to the extinguishment of the fire in this case. *The Clarita and the Clara*, S. C. U. S., Leg. Gaz., April 28, 1876.

3. **A VESSEL ANCHORED IN THE HUDSON**, opposite to the Hoboken wharves, if anchored three hundred and fifty yards from their river front, is anchored so far from shore that in case of a collision with a vessel towed in flames out of the Hoboken docks no allegation can be made that she is anchored too near the shore. *Ib.*

4. **A VESSEL AT ANCHOR HAVING AN ANCHOR LIGHT AND ONE MAN ON DECK**, though not strictly an anchor watch, is guilty of not being better lighted or watched. *Ib.*

5. **A VESSEL WHOSE BUSINESS IT IS TO GIVE RELIEF TO VESSELS ON FIRE** is bound to have chain hawsers or chain attachments on board, and if having only manilla hawsers she is compelled to tow a vessel out of its dock with such a hawser, which is burnt, so that the vessel on fire gets loose from the tug, and, drifting, sets fire to another vessel, the tug is liable for the damages caused. *Ib.*

See COMMON CARRIER.

## PARTNERSHIP.

**DISTRIBUTION OF ASSETS.** — WHERE A PARTNERSHIP AND THE SEVERAL MEMBERS OF THE FIRM ARE INSOLVENT, and there are no partnership funds for distribution among its creditors, the creditors of the firm are entitled to share equally with the creditors of each partner, in the distribution of his individual assets, — the amount so distributed to the creditors of the firm, however, not to exceed the amount of their claims. *Brock v. Bateman*, S. C. Ohio, Am. Law Reg., April, 1876.

See BANKRUPTCY, 6.

## PARTY-WALL.

**LAND COVERED BY PARTY-WALL. — EASEMENT, ETC.** — Land which is covered by a party-wall remains the several property of the owner of each half, but the title of each is qualified by the easement of the other of support of his building by means of the portion of the wall belonging to his neighbor. The easement of support is the only proper one attached to a party-wall, and does not include a right to the unobstructed use of a flue by one of the parties which is on the land of the other. The common law rule is that where the owner of two heritages, or of one consisting of several parts, arranged and adapted them so that one derives a benefit from the other of an obvious and continuous character, and then conveyed one of them without mentioning such incidental advantage or burden of the one in respect to the other, there is an implied agreement that such advantage and burden shall continue as before the separation of the estate. In order to affect a purchaser of property with notice of an easement in favor of an adjoining owner, the same must be continuous and apparent.

The owner of a fifty-foot lot divided the same into two equal parts by an east and west line, and built a dwelling-house on the north part, and placed the south wall thereof so that half of it stood on each lot, and also made an eight-inch projection on the south side of the wall resting on the south lot, containing a flue which was specially adapted and used for carrying off smoke from a furnace permanently built in the house. The owner conveyed the north half of the fifty-foot lot to the centre of the south wall, with the house, to complainant, and subsequently sold the south half of the fifty-foot lot to defendant. *Held*, that the easement being obvious and apparent to any observer, the purchaser of the south lot was chargeable with notice, and would be enjoined from interfering with the flue. *Ingals v. Plamondon*, S. C. Ill., Am. Law Reg., April, 1876.

## PAYMENT. See ADMINISTRATOR.

## RAILROAD.

**EFFECT OF PURCHASE OF RAILROAD BY ANOTHER COMPANY.** — The North Missouri Railroad Company existed and operated its road under a special charter granted it by the Legislature of Missouri. It mortgaged its road, together with all its privileges, functions, and powers, — having power so to do. The road, together with its franchises, &c., was sold to foreclose this mortgage, and purchased by one Jessup, who soon thereafter transferred it to the defendant corporation, a corporation organized under the general railroad law of Missouri. *Held*, that the new corporation succeeded to all the rights and liabilities of the former company, and that its rights and liabilities are governed by the former charter, and not by the general railroad law. *Daniel v. St. L. H. C. &c. R. R. Co.*, S. C. Mo., Cent. L. J., April 28, 1876.

See BOND; COMMON CARRIER.

SPECIFIC PERFORMANCE. See GOOD-WILL.

SUBSCRIPTION. See CONTRACT.

TROVER. See DAMAGES.

## SUPREME COURT OF OHIO.

(To appear in 26 Ohio State.)

CONTRACT TO CONSTRUCT HOUSE. — CHANGES MADE DURING CONSTRUCTION. — MEASURE OF RECOVERY, ETC.

## GOLDSMITH v. HAND.

Where a contractor, under a written agreement between them, constructed a house for and on the lands of the owner, substantially in accordance with the terms of the contract, as verbally changed in some respects as to size, form, and material of some parts of the work, by consent of parties during the progress of the work, and leaving little only to be done to complete it; and the owner, during the progress of the work, had without objection made payments in pursuance of his agreement as designated portions of the work were done, and had taken possession and was using the house for the purposes intended; in an action brought to recover a balance due on the contract: *Held*, first, that the plaintiff might recover without proving that the contractor had strictly performed the contract. Second, that as to unfinished work, the plaintiff was entitled to recover the balance due at the contract price, less such sum as it would require to construct or complete the unfinished parts. Third, that as to those parts which, by consent of both parties, during the progress of the work, had been constructed of materials and of size and form different from that required by the agreement, the plaintiff was entitled to recover the balance due at the contract price, less the difference in the value of those parts as constructed, and their value as the contract required them to be constructed.

**MOTION** for leave to file petition in error to reverse the judgment of the superior court of Cincinnati.

Henry Huntemann, a contractor and builder, entered into a written agreement with Moses Goldsmith, a lot-owner, by which the former agreed to furnish all the materials and build for the latter a house on his lot, in which to carry on the business of wholesaling and retailing dry goods, according to plans and specifications which were made part of the contract. The price agreed on for completing the house according to contract was \$13,000, about \$10,800 of which was to be paid during the progress of the work, and the residue in a specified manner after the work was completed. There were also stipulations as to the price to be paid for certain kinds of work, in excess of the quantity named in the contract, if the same was found necessary and should be performed.

Huntemann, as he claims, built the house in accordance with the terms of the contract. Goldsmith went into possession of the building, and is using it for the purposes intended.

Huntemann claimed to have done extra work in pursuance of verbal instructions given by Goldsmith during the progress of the work, of the value of \$780, in completing the house. Including this sum for extra work, he claimed that there was a balance due of \$2,782.79, for which sum he perfected his mechanic's lien under the statute; after which he assigned the claim and the lien securing it to Sylvester Hand in trust for all the unpaid material-men. Hand sued Goldsmith to recover the amount claimed to be due to his assignor. The petition contains two causes of action. The first founded on the written contract, as verbally changed by consent, and alleging a compliance with the same in every respect by Huntemann. The second is founded on the account for extra work.

The answer admits the execution of the contract, and agreement to pay; alleges the payment of over \$11,000 on the contract, and denies all other allegations of the petition, and also sets up a counter-claim for damages on account of delay in the completion of the work, and for defective materials and unfinished work.

On the trial, a bill of exceptions was taken by the defendant below, which sets out the tendency of only so much of the testimony as was deemed necessary to show the pertinency of the legal questions made in the case.

The defendant requested the court to give the following instruction to the jury:—

"1. The plaintiff in this action cannot recover the contract price for putting up the building stated by him in his petition herein to have been built, unless he prove that Henry Huntemann, his assignor, has fully completed his said contract, and each and every obligation imposed on him by the terms of his said contract set up in his petition." Which the court refused to give, and the defendant excepted.

In its general instructions the court charged the jury as follows: "If Huntemann had not performed his agreement to build said house fully, but had substantially completed it, and leaving little only to be done, and so far performed it as to erect a structure useful to the defendant Goldsmith, then they should allow the plaintiff the contract price for building the same, less such amount as it would take or require to construct those parts by said Huntemann omitted or neglected to be built or constructed; and if said Huntemann had, by the consent or agreement of both parties, during the progress of the work, constructed some parts of said building of materials different from that required by his agreement, or of size and form different from that by said agreement required of him, but yet if, as constructed and made in consequence of said agreement, the same were useful to the defendant Goldsmith, then the plaintiff should recover the contract price for erecting said building, less the difference in the value of those parts so constructed, and their value as the contract required them to be constructed." To which instruction the defendant excepted. The jury gave the plaintiff \$2,535.10.

A motion for a new trial was overruled, and judgment entered on the verdict; to all of which the defendant excepted.

On error to the general term of the superior court, the judgment of the special term was affirmed.

This is a motion by the plaintiff in error for leave to file a petition to reverse the judgment of the general term of the superior court.

There are a number of errors assigned, but only those relating to the charge of the court will be particularly noticed.

*T. A. Lane*, for the motion.

— *Crawford*, contra.

GILMORE, J. Passing over some of the assignments of error, which will be incidentally noticed hereafter, those of most importance, without reference to the order in which they are assigned, will be first considered. They are: First. That the court erred in refusing to give the special instructions requested by the defendant below. Second. That the court erred in its instructions to the jury.

The charge requested by the defendant and refused by the court was in effect this: That the plaintiff could not recover on the contract, unless his assignor had fully performed it in every respect in accordance with its terms.

The question here raised belongs to a class upon which the authorities are conflicting.

It is claimed by the counsel for plaintiff in error that it falls within the rule estab-



lished by the following cases: *Witherow v. Witherow*, 16 Ohio, 238; *Larkin v. Buck*, 11 Ohio St. 561, and *Allen v. Curles*, 6 Ohio St. 505.

*Witherow's case* arose out of a contract for the sale of a specified quantity of corn to be delivered within a designated period, to be paid for at a stipulated price after the delivery of the entire quantity of corn contracted for.

The seller delivered a portion of the corn and refused to deliver the residue. It was held that the contract was entire, and that the seller was not entitled to recover under the contract or otherwise for the portion of corn delivered.

In *Larkin's case* there was a contract for six months' services. The plaintiff labored one month and quit without the fault of the employer. The court found the contract to be entire, and held that the plaintiff was not entitled to recover for the month's services rendered.

*Allen's case* was this: He agreed to prepare and furnish the materials and build for Curles a saw-mill, to be completed by a specified time, for five hundred dollars, to be paid after the work was completed. Allen laid the foundation walls and raised the frame of the mill, which were worth two or three hundred dollars, and then abandoned the work. There was no evidence that Curles was in fault, or that he had accepted or taken possession of the work as performed. It was held that Allen could not recover for the labor done or materials furnished in part performance of the contract.

In each of these cases the court found the contract to be entire and subsisting. Nothing appeared in either of the cases indicating that there had been an intention to comply with the contract by the party seeking to recover upon it; or, on the other hand, an intention to waive a strict performance of it by the party defending against a recovery. If either of these, or anything else equivalent to them, had appeared in the cases, they would not have fallen within the rule of law recognized in the cases. This is apparent from what was said by the court in each of the cases. In *Witherow's case* the court said: "So, in a contract like the one now under consideration, if there were any matter which would evince that the vendee had waived full performance, or that the vendor had been prevented by inevitable accident from full performance, he might recover for the corn actually delivered."

In *Allen's case* it is said: "Where the undertaking is to do work and furnish materials under the terms of a special contract, and the work is abandoned after part performance and left unfinished by the fault of the workman, in the absence of all evidence showing the assent of the employer or his acceptance of the part finished, there can be no recovery *pro tanto* upon any established principle known to the law."

In *Larkin's case* Judge Peck states the question to be: "Whether a contract for service upon a farm for six months certain, at a specified rate per month, no time being expressed therein for its payment, confers upon him who renders the service the legal right to sue for a partial performance, when he voluntarily abandons such service, without justification or excuse, at the end of the first month."

The principle of law recognized by these cases is this: That the courts will not encourage the violation of agreements by relieving the defaulting party from the intentional and unjustifiable breach of his agreement, and allowing him to recover *pro tanto* for the part performance of a contract that is entire, where the other contracting party is not in fault, and has not waived a full performance by acceptance or otherwise.

It is not our intention to modify the law as thus recognized and applied in the cases cited.

Is the case before us distinguishable from them? We think it is. Here it is apparent that the contract has been substantially performed by the contractor in accordance with the plans and specifications, as verbally changed by consent of parties during the progress of the work, as to the size, form, and materials of some parts of the building, leaving but little to be done to complete it. For the purpose of regulating the extent of payments to be made as the building progressed, the work was apportioned, commencing with a sum to be paid "when the digging is done," and specified sums to be paid as designated intermediate portions were respectively "done," and a designated sum "when the work is completed." These sums amount in the aggregate to over \$10,000, all of which seem to have been promptly paid by Goldsmith without objection; and when so substantially completed, he took possession of the house, and appears to be using it for the purposes for which it was built.

From all that is shown in connection with the above, it is to be fairly inferred that the contractor intended to comply with and perform the contract according to its terms, and indeed claimed on the trial to have done so.

The fact that it was provided that payments were to be made concurrently with the progress of the work, shows that the contract was not entire, in the sense that the employer had the right to insist upon full performance of it as a condition precedent to the right of the contractor to receive any compensation. And, in the absence of other testimony, the fact that payments were made as designated portions of the work were respectively done, would justify the presumption that the portions thus paid for were accepted, or that such payments were implied waivers of the right to object to the portions of the work upon which the payments were so made.

These features of the case, in addition to the fact that the employer was occupying and using the building for the purposes for which it was constructed, clearly distinguishes it from the Ohio cases above noticed, and that the rights of the parties must be ascertained in this case by some other than the rigid rule that was applied in those cases.

We think that where parties have dealt with each other as these parties respectively have, in reference to the contract and the mode of its performance, and the owner of the lot has chosen to go into the occupancy and use of the building erected upon it, thereby appropriating to himself the fruits of the contract, he ought, on the plainest principles of justice, to pay for them at the contract price, less such sums for delay, defective work, or inferior materials, &c., as the owner is in equity entitled to have deducted. This view seems to be in accord with the authorities of some of the other states on the subject.

Some of these, which appear to be directly in point, will be noticed.

In *Jewett v. Weston*, 11 Maine, 346, a house was to be built by contract. There was a deviation. The defendant took the house, and the plaintiff was allowed to recover the contract price, less such sum as would compensate the defendant for any failure of fulfillment.

In *White v. Oliver*, 36 Maine, 92, it was held that: "Upon the erection of a building under a special contract, the contractor, though he may have departed from the contract as to the size of the building and quality of the work, yet, if the building has been accepted, is entitled to recover for the labor and materials at the contract price, deducting so much as they are worth less on account of the departures."

In *Hayward v. Leonard*, 7 Pick. 181, the facts were very similar to those in the case before us, and it was in effect held, that where H. had entered into a special contract to perform work for L., and to furnish materials, and the work was done and the materials furnished, but not in the manner stipulated for in the contract, . . . H. might maintain an action against L. on a *quantum meruit* for his labor, and a *quantum valebant* for the materials, and the proper measure of damages was the contract price of the house, deducting from it so much as the house was worth less, on account of the variations from the contract.

The rule adopted in these cases for ascertaining the amount due in cases like the one before us is, we think, the correct one. It will be seen that the court below, in its charge to the jury, substantially followed the rule as laid down in the case last cited. We are of opinion that the court below did not err either in refusing to give the special charge requested, or in the charge as given.

Several of the other errors assigned relate to matters that were entirely discretionary with the court, and therefore not reviewable on error. Others are assigned in which we find no error, and they need not be further noticed.

*Motion overruled.*

MCLVAIN, C. J., WELCH, WHITE, and REX, JJ., concurred.

# THE AMERICAN LAW TIMES.

NEW SERIES. — JULY, 1876. — VOL. III., No. 7.

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## NOTES OF OPINIONS, DECISIONS, AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1875.

*Monday, April 24, 1876.*

No. 208. *James O'Brien, plaintiff in error, v. George M. Weld et al.* In error to the Supreme Court of the State of New York. Mr. Justice Hunt delivered the opinion of the court, reversing the judgment of the said supreme court, with costs, and remanding the cause for further proceedings, in conformity with the opinion of this court. This was an action brought to recover \$4,404.72 collected by the plaintiff in error as sheriff of the city of New York, under three executions, two of which were issued on judgments entered in favor of the defendants against F. W. and A. W., jointly and severally, one of which was issued on a judgment entered in favor of the defendants against F. W. alone. On the 24th of March, 1870, F. W. was thrown into bankruptcy. Prior to this time, W. & Co., the defendants in error, had obtained the judgments above mentioned, and executions upon the same were in the hands of the sheriff, the plaintiff in error, upon which day there was regularly obtained from the district court an injunction order directed to W. & Co. and to the sheriff, restraining them from disposing of F. W.'s property until the further order of the court. This order was duly served on W. & Co. and on the plaintiff in error. On the 6th day of July, 1870, W. & Co. presented a petition to the district court asking that the injunction be so modified as to allow the sheriff to sell the property of F. W. levied on previously to filing the petition in bankruptcy. On this petition of W. & Co. an order was made, directing that after deducting costs and charges, the avails of the sale should be brought into the district court to await its further orders. This order was entered with the clerk of the district court by and upon the motion of the counsel of W. & Co., and served upon the sheriff. A sale was made in pursuance thereof, and the money resulting from the sale was paid into court. W. & Co. now sue the sheriff for not paying this money to them, upon their executions, instead of paying it into court. To a plea setting up the facts above stated, a demurrer was interposed by the plaintiffs, which was sustained by the supreme court and court of appeals of the State of New York, and judgment rendered against the sheriff. The decision of these courts is here reversed, and the demurrer overruled.

No. 209. *Benjamin F. Butler, plaintiff in error, v. Alex. A. and William Thomson.* In error to the Circuit Court of the United States for the Southern District of New York. Mr. Justice Hunt delivered the opinion of the court, reversing the judgment of the said circuit court, with costs, and remanding the cause with direction to award a new trial. The plaintiff in error in this case was sued for moneys collected on execution, which, by order of the United States district court for the Southern District of New York, he had paid into that court to be applied in a bankruptcy proceeding pending therein. Weld & Co., the plaintiffs in execution, obtained the order in the bankruptcy court under which the money was deposited therein, and the court says that upon these facts it would be a violation of the principles of right and justice to hold that these parties can now maintain an action against the sheriff for paying the money into the court, in pursuance of an order obtained by them, instead of delivering it to them.

No. 646. *Henry M. Rector, appellant, v. The United States*; No. 692. *John C. Hale, appellant, v. The United States*; No. 772. *William H. Gaines & wife et al., appellants, v. The United States*; No. 893. *John H. Russell, appellant, v. The United States*. Appeals from the Court of Claims. Mr. Justice Bradley delivered the opinion of the court, affirming the judgment of the said court of claims in these causes. These are the noted Hot Spring cases, whose litigation has been so long before the courts and the public. The court reaffirms the judgment of the court of claims, complimenting the opinion of that court, which, it is said, saved the court much labor in dealing with details. The decision is that none of the claimants are entitled to the lands as against the government, and that all the claims advanced are equally untenable. In conclusion, the court remark that whatever hardship, if any, may ensue to the parties from this declaration of the law, there is no doubt it will be taken into due consideration by the legislative department of the government in dealing with the subject of the future disposition of the lands.

No. 169. *John Doe, ex dem. S. Oaksmith et al., plaintiffs in error, v. Horace S. Johnson*. In error to the Supreme Court of the District of Columbia. Mr. Justice Field delivered the opinion of the court, affirming the judgment of the said supreme court, with costs. In this cause it is ruled that forty years' possession of real estate does not create a valid title if the title of the United States is not in the holder.

No. 136. *John Garsed, appellant, v. William A. Beall et al.* Appeal from the Circuit Court of the United States for the Southern District of Georgia. Mr. Justice Clifford delivered the opinion of the court, affirming the decree of the said circuit court, with costs. This cause involved only questions of fact, and was not of general interest.

No. 193. *First National Bank of Charlotte, plaintiff in error, v. National Exchange Bank of Baltimore*. In error to the Court of Appeals of the State of Maryland. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgment of the said court of appeals, with costs. In this cause the doctrine is announced that a national bank, organized under the national banking act, may, in a fair and *bonâ fide* compromise of a contested claim against it, growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of the demand, so as to obtain by the arrangement a transfer of stocks, it being honestly believed at the time, that by turning the stocks into money, under more favorable circumstances than then existed, a loss could be averted.

No. 6. *Joseph A. Walker, plaintiff in error, v. Charles S. Sawinnet*. In error to the Supreme Court of the State of Louisiana. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgment of the said supreme court, with costs. Dissenting, Mr. Justice Clifford and Mr. Justice Field. In this case, which was an action to recover for refusing refreshments to the defendant in error on account of color, the court reaffirms that article 7 of the Constitution, providing that, in suits at common law where the value under controversy shall not exceed twenty dollars, the right of trial by jury shall be preserved, relates only to trials in the federal courts, and say that the states, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law, pending in the state courts, is not, therefore, a privilege or immunity of national citizenship, which the states are forbidden by the fourteenth amendment, to abridge. A state cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. Trial by the settled course of judicial proceedings meets this requirement. Due process of law in the states is regulated by the laws thereof. The state court has decided in this case that the trial without a jury was in accordance with the law of the state, and the law is not found to conflict with the Constitution or any law of the United States. Affirmed.

No. 958. *County of Pickens, plaintiff in error, v. Richmond & Danville Railroad Co.*, No. 959. *County of Pickens, plaintiff in error, v. Bank of Commerce of Richmond*. In error to the Circuit Court of the United States for the Southern District of South Carolina. Mr. Chief Justice Waite announced the decision of the court, dismissing the writs of error in these causes for want of jurisdiction.

Friday, April 28, 1876.

No. 102. *Jane F. Haywood et al., plaintiffs in error, v. Charles Dewey, assignee, &c.* On motion of Mr. E. B. Smith, in behalf of Mr. S. F. Phillips, of counsel for defendant in error, reversed with costs and remanded, &c.

Monday, May 1, 1876.

No. 3 (original). *State of Florida, complainant, v. E. C. Anderson, Jr., et al.* Mr. Justice Bradley delivered the opinion of the court, turning over the road, now in the hands of the receiver, to the agent of the State of Florida.

No. 870. *H. J. Anthony et al., plaintiffs in error, v. The Bank of Commerce.* Mr. Chief Justice Waite announced the decision of the court, granting the motion to amend the writ, and denying the motion to dismiss.

Monday, May 8, 1876.

No. 222. *The Franklin Fire Insurance Company, plaintiff in error, v. James L. Vaughan.* In error to the Circuit Court of the United States for the Eastern District of Arkansas. Mr. Justice Hunt delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. This cause involved only questions of fact not of general interest.

No. 937. *Selucius Garfield, appellant, v. The United States.* Appeal from the Court of Claims. Mr. Justice Hunt delivered the opinion of the court, reversing the judgment of the said court of claims, and remanding the cause for further proceedings, in conformity with the opinion of this court. The principal question in this cause was whether the acceptance of proposals by one of the executive departments of the United States created a contract of the same force and effect as if a formal contract had been written and signed by the parties. It is here resolved affirmatively.

No. 215. *Joseph Reckendorfer, appellant, v. Eberhard Faber.* Appeal from the Circuit Court of the United States for the Southern District of New York. Mr. Justice Hunt delivered the opinion of the court, affirming the decree of the said circuit court, with costs. Dissenting, Mr. Justice Strong. The opinion in this cause is published in the present issue of the Am. Law Times Reports.

No. 150. *G. W. Harshman, plaintiff in error, v. Bates County.* In error to the Circuit Court of the United States for the Western District of Missouri. Mr. Justice Bradley delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. This was an action brought to recover the amount due on certain coupons attached to bonds of Bates County, Missouri, issued at the request and on account of Mount Pleasant township, in said county, in payment of a subscription on behalf of the township to the capital stock of the Lexington, Lake & Gulf Railroad Company. The subscription was made under a law of Missouri, called the "Township Aid Act," passed in 1868, by which, on the application of twenty-five tax-payers and residents of any township for election purposes in any county, the county court may order an election to be held in such township to determine whether and on what terms a subscription to any railroad to be built in or near the township shall be made; and if two thirds of the qualified voters of the township, voting at such election, are in favor of the subscription, the county court shall make it in behalf of the township, and if bonds are proposed to pay the subscription, the court shall issue such bonds in the name of the county, but to be provided for by the township. It is contended that this law is repugnant to the 14th section of article 11 of the Constitution of Missouri, adopted in 1865, by which it is declared that "the general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." The act is here held to be an infraction of the constitutional provision quoted, and the bonds, containing sufficient notice on their face, invalid.

No. 199. *Branch Sons & Co. et al., appellants, v. The City Council of Charleston et al.*; No. 200. *The City Council of Charleston et al., appellants, v. Branch Sons & Co.* Appeals from the Circuit Court of the United States for the District of South Carolina. Mr. Justice Bradley delivered the opinion of the court modifying and affirming the decree of the said circuit court in these causes, each party to pay their own costs. These causes are said to have been substantially settled by *Tomlinson v. Branch*, 15 Wall. 460, and *Charleston v. Branch*, Ib. 470.

No. 201. *The Coastwise Company, claimants, appellants, v. Nicholas de las Casas*; No. 202. *Nicholas de las Casas v. The Steamer Alabama, &c.* Appeals from the Circuit Court of the United States for the Southern District of New York. Mr. Justice Bradley delivered the opinion of the court, reversing the decree of the said circuit court, and remanding the causes for further proceedings in conformity with the opinion of this court.

Dissenting, Mr. Justice Clifford. This was a cause in admiralty. The *Ninfa* while being towed by the *Game Cock* was injured by the mutual fault of the *Game Cock* and *Alabama*. The district court rendered a decree against both for the whole amount of loss caused by the injury, regarding them as liable *in solido*. This decree was reversed in the circuit court. It is here held that a decree should have been made against both vessels in fault and their respective stipulators severally each for one moiety of the entire damage, interest, and costs, so far as the stipulated value of each vessel shall extend; and any balance of such moiety, over and above such stipulated value of either vessel, or which the libellant shall be unable to collect or enforce, shall be paid by the other vessel or her stipulators to the extent of the stipulated value thereof beyond the moiety due from said vessel.

No. 207. *Hiram Barney, Collector, &c., plaintiff in error, v. William Watson et al.* In error to the Circuit Court of the United States for the Southern District of New York. Mr. Justice Bradley delivered the opinion of the court, reversing the judgment of the said circuit court, with costs, and remanding the cause, with directions to award a new trial. It is announced in this cause that the protest required to be made by an importer under the Act of 1845 must be made at or before payment of the duties complained of. No protest can be made after payment.

No. 577. *The Central Railroad & Banking Company, plaintiffs in error, v. The State of Georgia*; No. 578. *The Southwestern Railroad Company, plaintiff in error, v. The State of Georgia*. In error to the Supreme Court of the State of Georgia. Mr. Justice Strong delivered the opinion of the court, reversing the judgment of the said supreme court, with costs, and remanding the causes for further proceedings in conformity with the opinion of this court. The court held in these causes that the charter granted to the Central Railroad and Banking Company of Georgia, by the Act of 1835, was not surrendered by its action under the Act of 1872, authorizing its consolidation with the Macon and Western Railroad Company; that it still has all the rights that were originally conferred upon it, holding them under the charter originally granted to it; and, consequently, that it was not in the power of the legislature to impose upon it a greater tax than one half of one per centum of its net annual income. But that the property of the road last named was not exempt, there being no provision in its charter for exemption.

No. 729. *George O. Marcy, plaintiff in error, v. The Township of Oswego, &c.* In error to the Circuit Court of the United States for the District of Kansas. Mr. Justice Strong delivered the opinion of the court, reversing the judgment of the said circuit court, with costs, and remanding the cause with directions to award a new trial. Dissenting, Mr. Justice Miller, Mr. Justice Davis, and Mr. Justice Field. This opinion appears in the present issue of the American Law Times Reports.

No. 728. *Humbok Township, plaintiff in error, v. N. Long et al.* In error to the Circuit Court of the United States for the District of Kansas. Mr. Justice Strong delivered the opinion of the court, affirming the judgment of the said circuit court in this cause, with costs. Dissenting, Mr. Justice Miller, Mr. Justice Davis, and Mr. Justice Field. This opinion is published in the present issue of the American Law Times Reports.

No. 907. *The United States, appellants, v. George W. Ross.* Appeal from the Court of Claims. Mr. Justice Strong delivered the opinion of the court, reversing the judgment of the said Court of Claims, and remanding the cause with directions to award a new trial. In this cause it is held that it is incumbent upon a claimant under the captured or abandoned property act to establish, by sufficient proof, that the property captured or abandoned came into the hands of a treasury agent, that it was sold, that the proceeds of the sale were paid into the treasury of the United States, and that he was the owner of the property and entitled to the proceeds thereof. All this is essential to show that the United States is a trustee for him, holding his money. That there is in the treasury a fund arisen out of the sales of property captured or abandoned, a fund held in trust for somebody, and that the claimant's property, after capture or abandonment, came into the hands of a quartermaster of the army, or a treasury agent, is not sufficient. There must be evidence connecting the receipt of it by the treasury agent with the payment of the proceeds of sale of that identical property into the treasury. It is not essential that the evidence be direct. It must, however, be such as the law recognizes to be a legitimate medium of proof. And the burden of proof rests upon the claimant who asserts the connection.

No. 223. *William Shuey, executor, &c., appellant, v. The United States.* Appeal from the Court of Claims. Mr. Justice Strong delivered the opinion of the court, affirming

the judgment of the said court of claims in this cause. In this case the court agree with the court of claims that the claim of Lieutenant Marie for an additional \$15,000, for services in apprehending Surratt, was not such as to entitle him to the reward offered for his apprehension. The giving of the information which led to the arrest, say the court, and the act of making it, are distinct things, and were so recognized in the proclamation offering the reward. As Lieutenant Marie did not make the arrest, there was no contract between him and the government as to the reward. Besides, the offer of the reward was withdrawn by an order of revocation five months before any information was given.

No. 185. *Henry Miller et al., plaintiffs in error, v. George W. Dale et al.* In error to the Supreme Court of the State of California. Mr. Justice Field delivered the opinion of the court, affirming the judgment of the said supreme court, with costs. In this cause it is decided: (1.) In an action of ejectment for land in California, where both parties assert title to the premises — the plaintiff under a concession of the former government, confirmed by the tribunals of the United States, and an approved survey under the Act of Congress of June 14, 1860, and the defendant under a patent of the United States issued upon a similar confirmed concession — the inquiry of the court must extend to the character of the original concessions to ascertain which of the two titles gave the better right to the premises; and if these do not furnish the means for settling the controversy, reference must be had to the proceedings before the tribunals and officers of the United States by which the claims of the parties were determined. (2.) Where the original concessions in such cases were without specific boundaries, being floating grants for quantity, the one first located by an approved survey appropriated the land embraced by the survey. (3.) The object of the proceeding before the tribunals of the United States for the approval of a survey of a confirmed claim to land in California under a Mexican or Spanish grant, pursuant to the Act of Congress of June 14, 1860, was to insure conformity of the survey with the decree of confirmation, and not to settle any question of title against other claimants. The approval of the court established the fact that the survey was in conformity with the decree of confirmation, or if the decree was for quantity only, that the survey was authorized by it, and is conclusive as to the location of the land against all floating grants not previously located.

No. 128. *William Burdell et al., plaintiffs in error, v. Augustus Denig & William E. Ide.* In error to the Circuit Court of the United States for the Southern District of Ohio. Mr. Justice Miller delivered the opinion of the court, reversing the judgment of the said circuit court, with costs, remanding the cause with directions to award a new trial. This was an action for damages for the infringement of letters patent. Evidence was given tending to prove that plaintiffs had advertised to sell their machines, and had actually sold a shop-right to use one of them for \$12.50, and had given a verbal license to another person to use an old machine in his house for \$5, but afterwards refused to sell or license for Franklin County, and told defendants they desired to retain the use of the machine as a close monopoly. Evidence had also been given as to profits made by defendants. On this testimony they asked the court to instruct the jury that "this testimony was not sufficient to change the rule of damages from the profits which plaintiffs would have made if they had not been embarrassed by the interference of the defendants, to a mere license price, because they do not establish a customary charge for the right to use the invention in Franklin County," which the court refused. The decision of the court below upon this point is here affirmed.

No. 205. *A. H. Hammond et al., appellants, v. Mason & Hamlin Organ Co.* Appeal from the Circuit Court of the United States for the District of Massachusetts. Mr. Justice Miller delivered the opinion of the court, affirming the decree of the said circuit court, with costs. This cause involved only the construction of a number of instruments not of general interest.

No. 221. *The City of St. Louis, appellant, v. The United States.* Appeal from the Court of Claims. Mr. Justice Miller delivered the opinion of the court, affirming the judgment of the said court of claims in this cause. In this suit it was sought by the appellant to recover possession of certain land known as the Jefferson Barracks. The court, after examining the claim, dismissed the appeal — finding all the facts as settled by the court below.

No. 702. *Isaac Taylor, Collector, &c., appellant, v. James Secor & William Tracy.* Mr. Justice Miller announced the order of the court, modifying the decree in this cause.

No. 195. *Jacob Magee & Henry Hall, plaintiffs in error, v. The Manhattan Life Insurance Co.* In error to the Circuit Court of the United States for the Southern District of

Alabama. Mr. Justice Swayne delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. The defendant in error sued the plaintiffs in error upon a bond which recited that Voorhes had been appointed an agent of the insurance company, and was conditioned for his paying over to the company all moneys belonging to it which he should receive. The breach alleged was that he had received such moneys which he had failed to pay over. The defendants pleaded three pleas: (1.) That Voorhes had paid over all moneys belonging to the company which he received after the execution of the bond. (2.) That at the time of the execution of the bond, Voorhes, as such agent, was indebted to the company, and that there was an agreement between him and the company that all moneys received by Voorhes should be credited upon this indebtedness; that these facts were concealed from the defendants, and that all the moneys so received were so credited. (3.) That the plaintiffs required the giving of this bond as a condition on which only they would retain Voorhes in their employment as such agent; that they required, further, an agreement by Voorhes that all his commissions thereafter earned should be applied to his past indebtedness to the company; that they were so applied; that the defendants were ignorant of the indebtedness and of this agreement; that if they had been informed of them they would not have executed the bond, and that the agreement as to the commissions and its execution were a fraud on them, and that the bond as to them was thereby avoided. The third plea was demurred to, and the demurrer was sustained. The opinion of the court below sustaining the demurrer is here affirmed.

No. 197. *Francis L. Markey et al., appellants, v. W. C. Langley et al.* In error to the Circuit Court of the United States for the District of South Carolina. Mr. Justice Swayne delivered the opinion of the court, affirming the decree of the said circuit court, with costs.

No. 216. *James P. Carroll et al., appellants, v. Joshua and Thomas Green.* Appeal from the Circuit Court of the United States for the District of South Carolina. Mr. Justice Swayne delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause with directions to dismiss the bill.

These causes involved only questions of fact not of general interest.

No. 503. *G. D. Newhall, appellant, v. Charles W. Sanger.* Appeal from the Circuit Court of the United States for the District of California. Mr. Justice Davis delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause, with directions to dismiss the bill. Dissenting, Mr. Justice Field and Mr. Justice Strong. The object of this suit was to determine the ownership of a quarter section of land in California. The appellee, who was the complainant, claimed through the Western Pacific Railroad Company, to whom a patent was issued in 1870, in professed compliance with the requirements of the acts of Congress commonly known as the Pacific Railroad Acts. The appellant derived title by mesne conveyances from one Ransom Dayton, whose patent, of a later date than that issued to the company, recited that the land was within the exterior limits of a Mexican grant called Moquelamos, and that a patent had, by mistake, been issued to the company. The court below decreed that the appellee was the owner in fee simple of the land, and that the patent under which the appellant claimed should be cancelled. This view is here affirmed.

No. 710. *The Town of Elmwood, plaintiff in error, v. George O. Marcy.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Davis delivered the opinion of the court, reversing the judgment of the said circuit court, with costs, and remanding the cause with directions to award a new trial. Dissenting, Mr. Justice Strong, Mr. Justice Clifford, and Mr. Justice Swayne.

No. 78. *Charles R. Tynq et al., plaintiffs in error, v. Moses H. Grinnell.* In error to the Circuit Court of the United States for the District of New York. Mr. Justice Clifford delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. In this cause the court defines the difference between "wrought iron tubes" and "wrought iron flues" as used in the revenue acts.

No. 211. *Frederick Robert et al., appellants, v. The Propeller Galatea, &c.* Appeal from the Circuit Court of the United States for the Southern District of New York. Mr. Justice Clifford delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause with directions to amend decree, affirming the decrees of the district court. This was a collision suit in admiralty, involving no questions of law.

No. 219. *Steam Ferry Boat America, &c., appellants, v. Camden & Amboy Railroad and Transportation Company.* Appeal from the Circuit Court of the United States for



the Southern District of New York. Mr. Justice Clifford delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause for further proceedings, in conformity with the opinion of this court. This was also an appeal in admiralty. This court finds that there was mutual fault and makes its decree accordingly.

No. 176. *The United States, appellants, v. Eugene Dickleman*. Appeal from the Court of Claims. Mr. Chief Justice Waite delivered the opinion of the court, reversing the judgment of the said court of claims, and remanding the cause, with directions to dismiss the petition. This was a claim for damages by a Prussian subject for the detention of the ship *Essex*, at New Orleans, by the military authorities, in September, 1862. The substance of the decision is, that by going to New Orleans, the *Essex* subjected herself to the operation of martial law, and must be content. She went there for gain, and voluntarily assumed all the chances of the war into whose presence she came. By availing herself of the privileges granted by the proclamation opening the port, she in effect covenanted not to do any acts in violation of the laws of war. The commander of the army there finding on board the *Essex* certain articles contraband of war, intended for use to promote the rebellion, directed that she should not clear until those articles were landed. His order was law, and the *Essex* is entitled to no damage under our treaty with Prussia, or by the general laws of nations.

No. 908. *The United States v. John B. Raymond, assignee in bankruptcy of J. W. Maybin*; No. 911. *Same v. Thomas Kidd*; No. 912. *Same v. James J. Cowan, administrator of Sarah Cowan, deceased*; No. 918. *Same v. J. B. Brabston*; No. 914. *Same v. Charlotte Spear*; No. 915. *Same v. E. K. McLean*; No. 916. *Same v. J. Reese Cooke*; No. 917. *Same v. Ellen D. Batchelor*; No. 918. *Same v. George Hawkins*; No. 919. *Same v. James J. Cowan, administrator of John Cowan, deceased*; No. 921. *Same v. A. F. Gardner, assignee in bankruptcy of Robert G. Johnson*; No. 924. *Same v. Hannah Bodenheim, executrix of Henry Bodenheim*. Appeals from the Court of Claims. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgment of the court of claims. Dissenting, Mr. Justice Field. The facts in these cases, as shown by the records and the findings of the court of claims, were that during the years 1863, 1864, and 1865 large quantities of cotton were captured by the military forces of the United States and taken from the owners in the State of Mississippi. The identity of the several parcels so captured was destroyed, and the property of each owner could not be traced. A very large quantity was used by the army of the United States for defensive purposes in the vicinity of Vicksburg. Much of it was stolen, destroyed, or otherwise lost. After the surrender of Vicksburg, such as could be found and saved was collected at that place and at Natchez, and afterwards intermingled and stored in a common mass. Subsequently it was sent forward and sold by the treasury agents in the same intermingled condition. The proceeds were paid into the treasury as a common fund produced from the sale of this common mass of unidentified cotton, shipped and received under these circumstances. The court of claims found as a fact that the cotton of each of these several plaintiffs contributed to and formed part of this mass so intermingled and sold. This finding was not based upon evidence specifically tracing the property of each claimant, but upon the assumption that, under the circumstances attending these collections, all cotton started from the place of capture, on the way to Vicksburg or Natchez, in a manner that would naturally carry it into the mass, must be presumed to have gone there, unless it was shown to have been lost or shipped to some other point. The court upon this finding ascertained the amount of the fund remaining in the treasury, after deducting payments theretofore made to other claimants; the number of bales sold to create the fund for which payment had not already been made, and the number of bales contributed by each of these plaintiffs to the common mass. It then gave judgment in favor of the plaintiff in each case for a sum which bore the same proportion to the whole fund still on hand, that the number of his bales did to the whole number then represented by the fund. The course of the court below is here approved and its judgments affirmed.

No. 198. *Gatus Whitfield, appellant, v. The United States*. Appeal from the Court of Claims. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgment of the said court of claims in this cause. Dissenting, Mr. Justice Field. In this case it is held that cotton sold to the Confederate States during the war by a resident of Alabama—he receiving lawful State bonds in payment—passed to the Confederate States and became their property, liable to capture and confiscation by the government. Nor did it affect the transfer that the Confederate States afterward became insolvent.

The contract was executed before the insolvency, and completed sales in such cases will be enforced, although contracts of sale in aid of the rebellion would not be.

No. 168. *H. N. Spencer, appellant v. The United States*. Appeal from the Court of Claims. Mr. Chief Justice Waite announced the decision of the court, affirming the judgment of the said court of claims.

No. 213. *The New York Life Insurance Company, plaintiff in error, v. Henrietta Henderson*. In error to the Supreme Court of Appeals of the State of Virginia. Mr. Chief Justice Waite announced the opinion of the court, dismissing the writ of error for the want of jurisdiction. Dissenting, Mr. Justice Bradley.

No. 900. *Michael McStay et al., plaintiffs in error, v. Jos. S. Friedman*. In error to the Supreme Court of the State of California. Mr. Chief Justice Waite announced the opinion of the court, dismissing the writ of error in this cause for the want of jurisdiction.

No. 190. *Selah Chamberlain, appellant v. The St. Paul & Sioux City R. R. Co. et al.* Appeal from the Circuit Court of the United States for the District of Minnesota. Mr. Justice Field delivered the opinion of the court, affirming the decree of the said circuit court, with costs. Dissenting, Mr. Justice Strong. In this cause it is held: (1.) The Act of Congress of March 3, 1857, granting certain lands to the Territory of Minnesota for the purpose of aiding in the construction of several lines of railroad between different points in the territory, only authorized for each road, in advance of its construction, a sale of one hundred and twenty sections; no further disposition of the land along either road was allowed, except as the road was completed in divisions of twenty miles; (2.) Where land is conveyed to the state by a corporation as indemnity against losses on her bonds loaned to it, the bondholders have no equity for the application of the land to the payment of the bonds which can be enforced against the state, and her grantees take the property discharged of any claim of the bondholders.

#### AMENDMENTS TO RULES.

Add at the end of paragraph 3, rule 6: There may be united with a motion to dismiss a writ of error to a state court a motion to affirm, on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need future argument.

Amendments to Rule 10 — Paragraph 1. So that it will read as follows: In all cases the plaintiff in error, or appellant (on docketing a cause and filing the record), shall enter into an undertaking to the clerk, with security to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

Paragraph 6. So that it will read as follows: In all cases of dismissal for want of jurisdiction the fees for the copy shall be taxed against the party bringing the cause into court, unless the court shall otherwise direct.

ADJOURNED TO THE TIME AND PLACE APPOINTED BY LAW.

#### DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

#### ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & Co.  
 Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.  
 Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & Co.  
 Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.  
 Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.  
 Daily Reg. — *Daily Register*, New York, 303 Broadway.  
 Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.

Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.  
 Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.  
 Leg. Gaz. — *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.  
 Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.  
 Mo. West. Jur. — *Monthly Western Jurist*, Bloomington, Ill., T. F. TIPTON.  
 N. B. R. — *National Bankruptcy Register*, New York, CAMPBELL & CO.  
 Pac. Law. Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.  
 Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.  
 W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.  
 West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & CO.

## ACT OF GOD. See CONTRACT.

## BANKRUPTCY.

ASSIGNMENT BY HUSBAND TO WIFE IN FRAUD OF CREDITORS. — Property was purchased in the wife's name, portions of it afterwards sold or exchanged and other property purchased, which, at the end of some years, and on the bankruptcy of the husband, had increased in value to \$20,000 — the wife had only contributed about \$3,000. *Held*, that the assignee in bankruptcy of the husband was entitled to the property. *Muirhead v. Aldridge*, C. C. U. S. N. J., Leg. Int., June 9, 1876.

## BILLS AND NOTES.

1. COUPONS OF RAILROAD BONDS. — WHEN NEGOTIABLE. — RIGHTS OF BONA FIDE HOLDER WHERE COUPONS HAVE BEEN STOLEN. — The coupons of certain railroad bonds were in these words: "\$35. The Indianapolis, Bloomington, (\$35) and Western Railway Company will pay the bearer, at its agency in the city of New York, thirty-five dollars in gold coin on the first day of April, 1871, for semi-annual interest on bond No. —. A. P. Lewis, Secretary." *Held*, that they were negotiable and entitled to all the incidents of negotiable paper, such as days of grace; also, that a *bona fide* purchaser after the coupons were due, but before the days of grace had expired, was entitled to recover, although the coupons had been stolen. *Evertson v. National Bank of Newport*, Ct. Ap. N. Y., Albany L. J., May 13, 1876.

2. *IBID.* — Certain coupons of railroad bonds were as follows: "\$35. Interest warrant for thirty-five (\$35) dollars upon bond No. — of the Danville, Urbana, Bloomington, and Pekin Railroad Company, payable in gold coin, at the office of the Farmers' Loan and Trust Company in the city of New York, April 1, 1871. W. J. Ernesttrout, Secretary." *Held*, that the coupons were not negotiable. *Id.*

## BOND. See BILLS AND NOTES.

## CHARTER. See CORPORATION, 3, 4.

## CONSTITUTIONAL LAW.

1. STATUTE WILL BE DECLARED VOID ON MOTION FOR PROVISIONAL INJUNCTION ONLY WHEN THE CASE IS VERY CLEAR. — It should be a very clear case to justify a court in deciding that an act of the legislature is invalid, upon a motion for a provisional injunction, a proceeding which addresses itself particularly to judicial discretion. *Lothrop v. Stedman*, C. C. U. S. Conn., Am. Law Reg., June, 1876.

2. THE STATEMENT OF A FACT IN THE PREAMBLE OF A STATUTE is not evidence as against a party affected without his consent, but where the legislature does an act within its powers, a statement of its reasons in a preamble will not affect the validity of its act. *Id.*

See CORPORATION, 3, 4.

## CONTRACT.

CONTRACT OF SALE. — AGREEMENT TO DELIVER CROP. — ACT OF GOD. — In March, 1872, defendant entered into a contract to sell to the plaintiff "two hundred tons of Regent potatoes grown on land belonging to the defendant at W., to be delivered in

September and October." Enough of defendant's land at W. to produce, under ordinary circumstances, the stipulated number of tons, was sown with potatoes, but owing to a blight which occurred in August, the land produced only eighty tons of potatoes, there being no default or negligence on the part of the defendant. The defendant having delivered the eighty tons, and an action having been brought for non-delivery of the remainder. *Held* (affirming the judgment of the queen's bench), that the above contract not being an absolute contract to deliver, but a contract to deliver specific goods, and the performance having been rendered impossible by causes over which the defendant had no control, the defendant was therefore excused. *Taylor v. Caldwell*, 3 B. & S. 826, followed. *Howell v. Coupland*, Eng. Ct. Ap., Albany L. J., June 10, 1876.

See CORPORATION, 8.

### CORPORATION.

1. THE PRINCIPLE THAT A STOCKHOLDER OF A COMPANY CANNOT MAINTAIN A BILL IN EQUITY AGAINST A WRONGDOER to prevent an injury to the corporation, unless it shall be averred, and shall affirmatively appear, that the corporation has refused to take measures to protect itself, does not extend to a bill which is in good faith filed by a creditor. *Lothrop v. Stedman*, C. C. U. S. Conn., Am. Law Reg., June, 1876.

2. A HOLDER OF A POLICY IN AN INSURANCE COMPANY is a creditor within this rule. *Ib.*

3. CHARTER DEFINED. — REPEAL OF CHARTER. — EFFECT OF REPEAL UPON EXISTING CONTRACTS. — POWERS OF LEGISLATURE. — APPOINTMENT OF TRUSTEE BY. — A charter is a contract between the state and the corporators, and the corporation takes the grant subject to the limitations contained in the act of incorporation. If no power of repeal is reserved, none can be exercised; but when a charter itself or a general statute provides that the charter is subject to repeal by the legislature, at its pleasure, without restrictions or conditions limiting the power of repeal, the legislature has the right to exercise its power summarily and at will, and its action, being a legislative and not a judicial act, cannot be reviewed by the courts, unless it should exercise its power so wantonly and carelessly as to palpably violate the principles of natural justice. A repeal of a charter does not of itself violate or impair the obligations of any contract which the corporation has entered into. But the legislature cannot establish such rules in regard to the management and disposition of the assets of the corporation, that the avails shall be diverted from or divided unfairly and unequally among the creditors, and thus impair the obligation of contracts, or that the portion of the avails which belong to the stockholders shall be sequestered and diverted from the owners, and thus injure vested rights. The legislature has the right to appoint a trustee, to take the assets and manage the affairs of a corporation, whose charter has been repealed, in conformity with the general, just rules which it has prescribed, or with the rules of a court of equity, if no statutory provisions have been enacted. If no trustee is appointed by the legislature, a court of equity, which never allows a trust to fail for the want of a trustee, would see to the execution of that trust, although by the dissolution of the corporation the legal title to the property had been changed. *Ib.*

4. CONDITIONAL REPEAL OF CHARTER. — DELEGATION OF LEGISLATIVE POWERS. — A statute repealing a charter at a certain date, provided that the company shall make up a deficiency in its assets before that date, then the charter shall remain in force, and appointing a special tribunal to determine whether the deficiency is made up or not, is not a delegation of legislative power, and is valid. A statute may be passed to take effect on the happening of a future event. *Ib.*

COUPONS. See BILLS AND NOTES, 1, 2

DURESS. See INSURANCE 4.

### EVIDENCE.

DECLARATIONS OF EMPLOYEE. — In an action against a railroad company for loss by negligence, the declarations of a brakeman or a section master, not near enough to the time and place of the accident to be parts of the *res gesta*, are not evidence. The rule

as to declarations of agents is the same for corporations as for individuals. *V. & T. R. R. Co. v. Sayers*, Ct. Ap. Va., Am. Law Reg., May, 1876.

### HOMESTEAD EXEMPTION.

**CONVEYANCE BY HUSBAND. — JOINDER OF WIFE.** — Under a statute which exempts from legal process a homestead in the possession of the head of a family, and the improvements therein, to the value in all of one thousand dollars, to enure to the benefit of the widow, and provides that the property shall not be alienated without the joint consent of husband and wife, evidenced by conveyance duly executed as required by law for married women, a deed by the husband, in whom was the legal title, neither naming the wife nor mentioning the homestead right, will not pass the homestead right nor estop the husband and wife from claiming the same, although signed by the wife and proved as required by law for married women. *Hoye v. Hollister*, Ch. Court of Nashville, Tenn., Cent. L. J., June 9, 1876.

### HUSBAND AND WIFE.

See **BANKRUPTCY; HOMESTEAD EXEMPTION; INSURANCE, 4.**

### INSURANCE.

**1. WHERE APPLICATION IS FILLED OUT BY THE AGENT.** — The court below instructed the jury as follows: "If you find that the plaintiff was asked to and did sign the application in blank, and the agent of the defendant filled it up on his motion without knowledge of plaintiff as to what the answers were; or if you should find that the plaintiff made true and correct answers, but the agent, in writing the answers, for any reason wrote incorrect answers, the plaintiff will not be responsible for the acts, mistakes, or wrongs of such agent." *Held*, that there was no error. *Kingston v. Aetna Ins. Co.*, S. C. Iowa, Ins. L. J., May, 1876.

**2. PREMIUM NOTE AND POLICY AS PART OF ONE CONTRACT.** — The note given for the premium provided that if not paid at maturity the premium should be considered earned, and the policy void, and the company should not be liable while the note remained overdue and unpaid. The policy contracted subject to the payment of the note, "according to the terms thereof, which constitutes the basis of this insurance." Also that the company should not be liable while due and unpaid, but liability should again attach on subsequent payment before suit brought. Also that suit might be brought after it was overdue sixty days, and the commencement of such suit should cancel all liabilities, and the premium should be considered as earned. *Held*, that the policy and note together constituted the contract, and all liability of the company ceased after commencement of the suit, though they might recover the premium. *Shultz v. Hawkeye Ins. Co.*, Ib.

**3. DESCRIPTION OF PROPERTY INSURED. — INCREASE OF RISK. — TERMINATION OF POLICY BY INSURER.** — The action was on two policies of insurance against fire, on buildings and machinery issued by the defendant to one Wilson, the owner, with the loss, if any, payable to the plaintiff, as his mortgagee. Each policy contained the following conditions: "If the assured shall cause the buildings, goods, or other property, to be described in this policy otherwise than as they really are, so that they be charged at a lower premium than is herein proposed, this policy shall be of no force; or if the risk shall be increased by any means whatever, within the control of the assured, during the continuance of the insurance, and notice be not given to the company, and such increased risk be allowed and indorsed thereon, this policy shall be of no force; or if, during the insurance, the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises, or otherwise; or if for any other cause the company shall so elect, it shall be optional with the company to terminate the insurance, after notice given to the assured, or his representative, of their intention to do so; in which case the company will refund a ratable proportion of the premium." Also attached to each policy were the customary "mortgagee clauses." The defendant proved the giving of notice to Wilson personally of its intention to terminate the policies, tendering to him the unearned premiums, on September 21, 1871, and notifying the plaintiff thereof. The loss occurred December 20, 1871. *Held*, that the above clause contained four distinct and independent conditions, each of the first two providing for the avoidance of the insurance, and each of the last two providing for the termination of the policies by the insurer; the grounds

of the first two being acts of the assured, the grounds of the third being acts of third persons, and the last clause resting on the judgment or volition of the insurers; that the last clause in the conditions constitutes a complete condition by itself, and gives the company an absolute right of election to terminate the policy at any time, by giving the notice and making the repayment prescribed therein; that the words "any other cause" in the last clause are not to be interpreted by the rule "*noscitur a sociis*," and reference to the preceding specified causes is not requisite to ascertain their meaning. That in view of the dissimilarity of the grounds and objects of the several clauses, and the exhausting of the class of increases of risk by the acts of the assured, by means of the words "by any means whatever" in the second clause, and the exhausting of the class of increases of risk by acts of third persons by force of the concluding words "or otherwise" in the third clause, the words "any other cause" in the final clause are excluded from the meaning of increase of risk of any kind; that the action taken by the company for terminating the policies in suit was sufficient for that purpose; that, on the facts above stated, it was error in the judge at the trial to direct a verdict for the plaintiff after the ordinary proof of the loss, with proof by the defendant of such notice and repayment. *International R. Co. v. Franklin Fire Ins. Co.*, lb.

4. HUSBAND AND WIFE. — POLICY ON HUSBAND'S LIFE PAYABLE TO WIFE. — ASSIGNMENT BY WIFE. — *DURRES*. — A policy of insurance was taken on the life of a husband for the sole use of his wife, and payable to her or her assigns. The wife, influenced by the importunity of her husband, and under circumstances amounting to a controlling duress, and which deprived her of that necessary freedom in the exercise of her mental faculties to make the act binding upon her, attached her signature to a blank printed form not attached to the policy, without name of assignee or date, or designation of the policy, and with no direction from her as to filling the blanks or delivery of the assignment or policy. B. having advanced to the husband certain promissory notes to a large amount, which he had finally to pay, upon the faith of the husband's securing him by the assignment of policies of insurance and other property, the husband caused the assignment to be filled up with a transfer of the policy aforesaid to B., and delivered this assignment, and subsequently also the policy itself, to B. Upon the death of the husband, in a contest between the wife and the assignee of B. (for the benefit of creditors), as to which was entitled to recover on the policy, it was held: 1. That B.'s assignee could claim no greater right than B. held in the policy; 2. That the wife was entitled to recover, as the importunity under which she signed the instrument of assignment was such as to deprive her of her free agency, or such as she was too weak to resist, and she ought not to be held responsible therefor. *Whitridge v. Barry*, Ct. Ap. Md., Am. Law Reg., June, 1876.

See CORPORATION, 2.

### MUNICIPAL CORPORATION.

LIABILITY FOR NEGLIGENCE IN KEEPING ITS STREETS IN REPAIR. — MUNICIPALITY CANNOT DIVEST ITSELF OF RESPONSIBILITY UNLESS AUTHORIZED BY STATUTE. — The charter of a company operating cars drawn by horse power upon tracks laid in the streets of a city provided that said corporation should keep in repair such portions of the streets as should be occupied by their tracks, and should be liable for any loss or injury that any person shall sustain by reason of any carelessness, neglect, or misconduct of its agents and servants, in the management, construction, or use of said tracks or streets; and in case any damage shall be recovered against said towns or the said city, by reason of any such misconduct, defect, or want of repairs, said corporation shall be liable to pay such towns and city respectively any sum thus recovered against them, together with all costs and reasonable expenditures incurred by them respectively, in the defence of any such suit or suits in which recovery may be had; and said corporation shall not incur any portion of the streets or highways not occupied by said tracks. In an action against the city to recover damages for injuries caused by a defective highway, which was made unsafe by work done by the railroad company on its track: Held, that the city was liable for neglecting to keep its streets safe and convenient for public travel; that the duty, resting upon a town or city, to keep its highways safe and convenient, is a public duty, and that it has no power, unless authorized by statute, to divest itself, either by contract or ordinance, of its capacity to discharge this duty. *Watson v. Tripp*, S. C. E. I., Am. Law Reg., May, 1876.

### NEGLIGENCE.

**FAILURE OF RAILROAD COMPANY TO GIVE SIGNAL.** — WHERE AN ANIMAL IS KILLED BY A TRAIN AT A PUBLIC CROSSING, proof that the employees in charge of the train failed to ring the bell or sound the whistle, as required by the statute (Wag. Stat. § 8), is not sufficient to authorize a verdict against the company. It must be further shown by facts and circumstances that such neglect caused the injury. The failure to give the signals is negligence, but having shown that fact, it must be supplemented by testimony to show that the negligence caused the damage, and the burden of proof is upon the plaintiff to show that such negligence caused the injury. *Howenstein v. Pacific Railroad*, 55 Mo. 33, overruled; *Owens v. H. & St. J. R. Co.* 58 Mo. 386, not followed. *Holman v. Chicago & R. I. & S. R. R. Co.*,<sup>1</sup> S. C. Mo., Cent. L. J., June 9, 1876.

See EVIDENCE; MUNICIPAL CORPORATION.

### PARENT AND CHILD.

**1. OF THE CUSTODY OF THE CHILD.** — PRIMA FACIE RIGHT OF FATHER MAY BE WAIVED OR FORFEITED. — RULES BY WHICH COURTS WILL BE GOVERNED. — DISCRETION OF CHILD, ETC. — The father is *prima facie* entitled to the custody of his children, and where he is of good character and able and willing to maintain them, his right is paramount to that of all other persons, except in the single case of an infant of such tender years as to necessarily require for its own good the care of its mother. But the father's right is not absolute or unqualified. He may relinquish or forfeit it by contract, by his bad conduct, or by his misfortune in being unable to give it proper care and support. Where a father has, through his fault or his misfortune, lost or forfeited his right, and subsequently, by reformation or otherwise, reinstates himself in a position to properly care for and maintain his child, his right does not necessarily revive; but a court upon *habeas corpus* will exercise a sound discretion in view of all the circumstances with reference to the welfare of the child itself. A court will never order a child into the custody of an improper person; but where the child has reached the age of discretion the court will in many cases allow it to make its own choice, even though it choose a person whom the court would not voluntarily appoint. There is no fixed age at which the period of discretion is considered to begin. It depends on the capacity of the child to reason sensibly, though as a child, in regard to its condition, its feelings, and its future welfare. *State v. Bralton*, S. C. Del., Am. Law Reg., June, 1876.

**2. COURTS HAVE NO JURISDICTION OVER THE RELIGIOUS DISCIPLINE AND INSTRUCTION OF CHILDREN.** — Such matters are proper to be taken into consideration, among other circumstances, in determining the custody of children where it is in dispute; but a difference in regard to religious views does not of itself afford any ground for interference by the court on petition of a father who has lost or forfeited his right of custody, with the person who has acquired such right. *Id.*

### TRUSTS.

**TRUST CANNOT BE PROVED BY PAROL.** — CHURCH BUILT BY SUBSCRIPTION BUT TITLE VESTED UNDER THE LAWS OF THE ROMAN CATHOLIC CHURCH. — CHURCH USAGE, ETC. — It appeared that the land on which a Catholic church and parsonage stands was vested in the defendant, Bacon, bishop of the diocese, no trust being declared in writing: *Held*, that no special trust could be proved by parol. It appeared that the

<sup>1</sup> Judge HOUGH, writing for the court, uses the following language: "The foregoing extract clearly asserts that there is no necessary connection between the failure to ring the bell, or sound the whistle, and the killing; that both may concur in point of time, and the latter not be the result of the former. How then must the connection be shown? By evidence, undoubtedly, by the party who asserts that such connection exists. The damage must be shown to be the result of the negligence; that is, the negligence must first be shown, and this fact must be supplemented by testimony

tending to show that the negligence occasioned the damage.

"This testimony should consist of all the facts and circumstances attending the killing, so that the jury could fairly and rationally conclude whether it resulted from the failure to ring the bell, or sound the whistle, or from other causes. In the case at bar, no such testimony was offered. But two facts were shown to fix the defendant's liability; the failure to give the required signal at the crossing, and the killing. No fact was shown tending to connect the two." — EDITOR.

funds with which said land was bought and buildings erected had been furnished for that purpose by subscriptions made to the priest in charge for the time being, under the law, usage, and polity of the Roman Catholic Church: *Held*, that no trust resulted to the society or congregation worshipping in said church. *Held*, that, assuming that the said congregation or society could, under said statutes, be considered as having corporate powers, these plaintiffs could not maintain their bill for the protection of the *quasi* corporate rights, because it did not appear that they had any authority, and that they could not maintain the bill for the protection of their own interest in the *quasi* corporate property without alleging that the society was fraudulently neglecting to protect its own rights, and making the society a party defendant. The defendants having stated in their answer that by the law, usage, and polity of the Roman Catholic Church, the title to all lands used for religious purposes, churches, &c., is vested in the bishop of the diocese in which the same are situated, for the use and benefit of the universal Catholic Church, and that all gifts and contributions for such purposes are understood to be made under that rule, and that these gifts and contributions were made under that rule, and it having been found by the court that the legal title to the property was vested in the defendant, the bishop, without any written declaration of trust, and that he was accountable only to his ecclesiastical superiors: *Held*, that the said defendant was not accountable in this suit for his management of the property; and it appearing that the defendant Walsh had acted under the bishop's direction: *Held*, that he was not accountable in this suit: *Held*, that this court had no authority to take this property from the bishop and place it in the hands of a new trustee. *Henessy v. Walsh*, S. C. N. H., Am. Law Reg., May, 1876.

See CORPORATION, 3.

#### WILL.

WHERE THERE IS NO SUBSTANTIAL EVIDENCE OF THE INCAPACITY OF TESTATOR, the validity of his will should not be submitted to a jury, merely because its provisions may seem to be unjust to some of his children. The growing disposition of courts and juries to set aside last wills and testaments, and to substitute in lieu thereof their own notions as to what a testator should do with his property, is not to be encouraged. *Cuffman v. Long*, S. C. Pa., Leg. Int., June 9, 1876.

### SUPREME JUDICIAL COURT OF MASSACHUSETTS.

(To appear in 116 Mass.)

#### TORT AGAINST TOWN ASSESSORS FOR ASSESSING ILLLEGAL TAX.

#### ALGER v. INHABITANTS OF EASTON.

An action of tort cannot be maintained against a town for the acts of its assessors and collectors. in assessing illegally a tax upon a person not an inhabitant thereof, even if the assessors act with integrity and fidelity, and are therefore by the Gen. Sts. c. 11, § 51, not themselves liable to an action.

TORT for assault and battery and false imprisonment. Trial in the superior court, before Aldrich, J., who allowed a bill of exceptions in substance as follows:—

The plaintiff was assessed by the assessors of the defendant town, there being no want of integrity and fidelity on their part, for a poll tax for the year 1873. The assessors duly committed their tax list with their warrant to the collector of the defendant town. The collector afterwards duly issued a warrant to Rufus H. Willis, a deputy sheriff, residing in said town of Easton. The deputy, after due notice to the plaintiff, and for want of sufficient goods upon which to levy said tax, took the body of the plaintiff, and committed him to prison. The plaintiff paid the tax and costs on the following day and was discharged



from imprisonment. The amount of the tax, which was two dollars, was afterwards paid into the town treasury by the collector.

The plaintiff admitted, and it appeared in evidence, that all the proceedings of the assessors, collector, and deputy were regular, and in legal and proper form; but contended and offered evidence tending to show that he was not an inhabitant of the town of Easton on May 1, 1873, and that he was then an inhabitant of West Bridgewater, an adjoining town, to which he moved in May, 1872.

The defendant asked the judge to rule, that if the plaintiff was not an inhabitant of Easton on May 1, 1873, and for that reason was improperly assessed by the assessors of the town, and arrested and imprisoned as before stated, yet this action could not be maintained against the town.

The judge declined so to rule, but submitted the case to the jury upon instructions not objected to.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*E. H. Bennett & H. J. Fuller*, for the defendant, were stopped by the court.

*J. Brown*, for the plaintiff.

GRAY, C. J. This action cannot be maintained. The assessors and collectors, though elected by the inhabitants of the town, are not the agents of the town, but are public officers whose duties are prescribed by law. *Dunbar v. Boston*, 112 Mass. 75. If the tax was illegally assessed upon the plaintiff, his only remedy is by action of contract against the town to recover back the money paid. *Baker v. Allen*, 21 Pick. 382.

The plaintiff relies upon the case of *Durant v. Eaton*, 98 Mass. 469, in which, upon facts like those of the present case, an action of tort was brought against the assessors and collector, and the officer who served the warrant; and Chief Justice Chapman said, "The statute which protects assessors from responsibility, except for the want of integrity and fidelity on their own part (Gen. Sts. c. 11, § 51), throws the exclusive responsibility upon the town, and makes it responsible to the plaintiff if he can establish his case." But the question of the form of action against the town was not then before the court; and that the chief justice did not mean to say that the town would be liable to an action of tort is shown by the first words of his opinion, "The case of *Baker v. Allen*, 21 Pick. 382, is decisive of this case." See, also, *Loud v. Charlestown*, 99 Mass. 208.

*Exceptions sustained.*

Wells and Morton, JJ., absent.

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THE MONKS OF THE GRANDE CHARTREUSE AND THEIR TRADE-MARKS. — The Reverend Father in God, Marcel Marie Grézier, Procureur of the Convent of the Grande Chartreuse, has recently obtained a number of injunctions against American manufacturers who have been for years infringing the trade-marks used upon the famous cordial made at the ancient convent. The suits were very persistently defended, the defences urged being that the monks, as ecclesiastics, had no right to manufacture cordial, or, at least, had no right to be protected in so doing; that their trade-marks had been generally used by American and French manufacturers of cordials for a great number of years; and that as they were aliens the court would certainly refuse their demand when it was made to appear that to grant it would be tantamount to breaking up the defendant's business. Sundry other points were presented of a technical character and were earnestly pressed at length.

To these defences it was replied on behalf of the convent that the complainant had complied fully with the laws of the United States in respect of the registration of their trade-mark, and that the use of that which belonged to the complainant by others, no matter how long continued the use might have been, only aggravated the injury. It was further said in reply to the special defences that they were disingenuous and not of a character to enlist the sympathy of a court of equity.

Judge Shipman very cordially assented to the views of the counsel for the convent, and granted the injunctions in all the cases. He expressed his opinion at considerable length, sustaining all the points made on behalf of the monks.

## NOTES OF NEW BOOKS.

Messrs. BAKER, VOORHIS & Co. have published *A Treatise on the Law of Negotiable Instruments*, including Bills of Exchange, Promissory Notes, Negotiable Bonds, and Coupons, Checks, Bank Notes, Certificates of Deposit, Certificates of Stock, Bills of Credit, Bills of Lading, Guaranties, Letters of Credit, and Circular Notes. By John W. Daniel, of the Lynchburg (Va.) Bar. In two volumes. Price \$13.

THE BENCH AND BAR OF THE SOUTH AND SOUTHWEST. By Hon. Henry S. Foote. St. Louis: Soule, Thomas & Wentworth. A very enjoyable book, made up of Judge Foote's reminiscences of his intercourse with the Bench and Bar of the South and Southwest. If the book has a fault it comes of the generous impulses of its author, who finds little to condemn and much to commend in all the subjects of his sketches. But this fault, if such it be, will scarcely detract from their pleasant character.

Messrs. JOHNSON & Co., of Philadelphia, have just published a new (the tenth American) edition of *Starkie on Evidence*, with Notes by Judge Sharswood. They have in press a fourth edition of *White & Tudor's Leading Cases in Equity*, with Notes and References by Wallace and Hare.

Messrs. G. & C. MERRIAM, of Springfield, Mass., have issued a new and much improved edition of *Chitty on Pleadings*. It is in two volumes, and edited by J. C. Perkins, Esq.

Messrs. KAY & BRO., of Philadelphia, announce the following works as nearly ready: *The Law of Slander and Libel* (founded upon the Treatise of the late Mr. Starkie), including the Pleading and Evidence, adapted to the present Procedure, with Forms and Precedents; also Malicious Prosecutions, Contempts of Court, &c. By Henry Coleman Folkard, Esq., Barrister at Law. From the Fourth English Edition. With Notes and References to American authorities. *A Practical Treatise on the Law of Replevin in the United States*, with an Appendix of Forms and a Digest of Statutes. By P. Pemberton Morris, Esq. Third edition. *A Treatise on the Law and Practice as to Receivers appointed by the Court of Chancery*. By Wm. Williamson Kerr, of Lincoln's Inn, Barrister at Law. With American Notes, by G. Tucker Bispham, Esq. Second edition. *A Treatise on the Law of Notice*, as applied in Equity, in controlling the Acquisition and Enjoyment of Titles; including the Doctrine of Purchases for Value, and of Equitable Assignments. By G. Tucker Bispham, Esq. *Leading Cases in the Law of the Statute of Frauds*. Being a complete collection of authorities, American and English, on the subject. By Henry Reed. *A Treatise on the Law of Executors and Administrators*. By Edward Vaughan Williams. Sixth American, from the last London edition, with Notes and References to American authorities. By J. C. Perkins.

WAIT'S LAW OF ACTIONS AND DEFENCES, a work designed to cover the subject generally, is announced by Messrs. Gould & Son, of Albany. It is to be in four volumes. Volume I. is now in press.

# THE AMERICAN LAW TIMES.

NEW SERIES. — AUGUST, 1876. — VOL. III., No. 8.

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## DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

### ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & CO.  
Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.  
Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & CO.  
Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.  
Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.  
Daily Reg. — *Daily Register*, New York, 303 Broadway.  
Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.  
Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.  
La. L. J. — *Louisiana Law Journal*, New Orleans, La.  
Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.  
Leg. Gaz. — *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.  
Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.  
Mo. West. Jur. — *Monthly Western Jurist*, Bloomington, Ill., T. F. TIPTON.  
N. B. R. — *National Bankruptcy Register*, New York, CAMPBELL & CO.  
Pac. Law. Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.  
Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.  
W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.  
West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & CO.

### ADMIRALTY.

1. COMPENSATION TO SEAMAN FOR INJURY NOT CAUSED BY NEGLIGENCE OF MASTER OR OWNER. — A seaman is entitled to wages during the time he is disabled by an injury received in the line of his duty, even though there was no negligence on the part of the master or owner. *Jackson v. The Fleta*, C. C. U. S. La., La. L. J., May, 1876.

2. JOINDER OF ACTIONS IN REM AND IN PERSONAM. — THE 19TH RULE. — The joinder of actions against both vessel and cargo *in rem*, or against the owners of the vessel and the owners of the cargo *in personam*, in a suit for the same salvage service, is not irregular; but, if the actions be joined, they must be pursued in the same manner; either both *in rem* or both *in personam*. *Nott v. The Sabine*, Ib.

### ATTORNEY AND CLIENT.

CONTINGENT FEE. — CLAIM AGAINST GOVERNMENT. — PUBLIC POLICY. — A contract for a contingent fee for the collection of a claim against the United States is not necessarily void. The parties entered into a con-

VOL. III.

tract in the following words: This agreement, made between Mrs. Jane C. Fackler, of Danville, State of Kentucky, of the first part, and S. G. Burbridge, of Covington, Ky., of the second part, witnesseth: that the party of the first part employs the party of the second part as her attorney to collect a claim against the United States for Q. M. stores as per claim, amount \$1,150.00, and in consideration of the services of the party of the second part, the party of the first part hereby agrees to pay the party of the second part an amount equal to one half of whatever sum of money may be collected from the United States on said claim. Dated this \_\_\_\_\_ day of \_\_\_\_\_, 187 . JANE C. FACKLER. [L. S.] *Held*: that the contract was valid and could be enforced in equity. *Burbridge v. Fackler*,<sup>1</sup> S. C. D. C., W. L. R., June 8, 1876.

### BANKRUPTCY.

1. COMPOSITION. — CORPORATION. — GROUNDS FOR CONFIRMATION. — Corporations as well as natural persons have the right to avail themselves of the provisions of the bankrupt law pertaining to composition. In deciding a motion to confirm a resolution of compromise, the court will take into account the relations of the creditors favoring the compromise to the debtor, and the relative number of creditors whose individual opinions are expressed in person by the resolution as compared with those who dissent. A resolution of compromise which is palpably opposed to the best interests of all concerned will not be confirmed. *In re Weber Furniture Co.*, D. C. U. S. E. D. Mich., 13 N. B. R. No. 12, page 529.

2. *IBID.* — PRACTICE IN RESPECT OF RECORDING RESOLUTION. — AUTHORITY OF CREDITORS. — When at a meeting of creditors, the debtor is examined in reference to the value of the assets mentioned in his statement, and the resolution of compromise is regularly passed, under section 17 of the Act of June 22, 1874, although there is a great apparent discrepancy between the assets contained in the statement and the percentage accepted by the resolution, and other *indicia* of fraud exist, the district court should not refuse to record it, without giving the debtor and majority creditors full opportunity upon notice and hearing, as provided by the statute, to bring before it all the facts in view of which the latter accepted the compromise. The English and American cases upon the authority of the creditors reviewed, and a strong preference expressed for the rule deduced from them, which makes the decision of the majority conclusive as to the *amount* of the compromise, where their judgment is exercised in

<sup>1</sup> In this cause the court said: We are of opinion that the court erred in withdrawing the agreements from the consideration of the jury. We do not understand that a contract for a contingent fee, which is otherwise fair upon its face, is in violation of public policy. In *Weed & Clarke v. Black*, we decided, at the last term, that a contract to pay a delegate in Congress for services rendered by him in securing the payment of a claim where legislation is required for that purpose, is absolutely void, but in the same decision, we also laid down the doctrine, that contracts for particular service such as the collection of evidence, the preparation of papers, or

the delivery of arguments in support of a claim were legitimate and could be enforced. Wash. L. R., vol. 3, No. 2, page 5; *Child v. Trist*, 21 Wall. 441. In the present case, the agreements simply provide a contingent compensation for collecting a claim against the United States. There is nothing apparent in the reading of the agreements affecting their validity as being to procure legislation on the part of Congress in any improper form, or indeed in any form whatever. They were erroneously excluded, and the judgment must therefore be reversed. — EDITOR.

good faith, and there is nothing to indicate fraud, accident, or mistake. *Ib.* page 559.

3. A RESOLUTION CANNOT BE RECORDED where the statement of assets and of debts shows that the requisite proportion of creditors have not confirmed it, although the statement is inaccurate. *In re Asten*, D. C. U. S. E. D. N. Y., 14 *Ib.* 1.

4. CORRECTION OF STATEMENT. — A statement of debts and assets can only be corrected at a meeting of the creditors. *Ib.*

5. FAILURE TO PLEAD COMPOSITION. — INJUNCTION. — If a debtor, after the adoption of a resolution of composition, omits to plead it, he is not entitled to relief against the judgment so obtained by an injunction from the district court. *In re Tooker*, D. C. U. S. E. D. N. Y., *Ib.*

6. LANDLORD'S LIEN. — UNDER THE LAWS OF PENNSYLVANIA a landlord is entitled to a lien for rent if an execution is issued before the commencement of the proceedings in bankruptcy, although the levy was not made nor a notice given to the sheriff until after that time. *Barnes's Appeal*, S. C. Pa., *Ib.*

7. TAXATION OF MARSHAL'S BILL. — PRACTICE, ETC. — When the marshal has concluded his services he may have his bill taxed, if there is an assignee, without waiting for the presentation of the final account. Notice of the taxation may be given to the assignee, and it is not necessary to give notice to the creditors. The assignee should examine the bill, and if he is satisfied that it is lawfully taxable at a certain amount, he may consent to its being taxed at that amount. The consent of the assignee is a sufficient warrant for the clerk to tax a bill for the amount so consented to. When the taxation is made, it is conclusive on the marshal and the assignee for the time being, and the marshal is entitled to receive the amount of his bill so taxed, unless it is shown that there is some fraud or bad faith on the part of the marshal or the assignee. When the marshal's bill has been taxed by the clerk, the register should countersign a check therefor. *In re Rein*, D. C. U. S. S. D. N. Y., *Ib.*

8. RECEIVER. — JURISDICTION OF STATE COURT. — If a receiver has been appointed by a state court, in a suit by stockholders against a corporation, the bankruptcy court will not, at the instance of creditors on the subsequent bankruptcy of the corporation, discharge the receiver and turn the property over to the assignee. *Myer v. Crystal Lake, &c. Works*, C. C. Cook Co. Ills., *Ib.*

9. JUDGMENT OF COURT THAT REQUISITE NUMBER OF CREDITORS HAVE PETITIONED FINAL. — EFFECT OF ADJUDICATION. — When the court has adjudged that the requisite proportion of creditors have joined in an involuntary petition, the judgment is final, not only as respects the debtor but as respects all his creditors, and will not be reexamined by the district court except upon an allegation of fraud or bad faith. After an adjudication of bankruptcy, no inquiry can be made into the truth of an affidavit filed to show that the requisite proportion of creditors have united in the petition, unless fraud or bad faith is alleged. The coöperation of the debtor in securing creditors, by lawful means, to unite in an involuntary petition is no ground for setting aside an adjudication. *In re Duncan*, D. C. U. S. S. D. N. Y., *Ib.*

10. SETTING ASIDE DISCHARGE. — LIMITATION OF TIME FOR. — On

the 14th of June, 1871, defendant obtained his discharge in bankruptcy. On June 10, 1874, plaintiff, assignee in bankruptcy of defendant, filed a bill in equity to set aside the discharge, on the ground of fraud in the schedule of assets filed by defendant, certain diamonds to the value of \$5,000, having been omitted from said schedule by defendant. The fraud was not discovered by plaintiff until July, 1872. *Held*, that, although under the ordinary statutes of limitations, the rule is that where the cause of action is based upon fraud, the statutes does not commence to run until it has become known to the party injured by the fraud, still, as by section 34 of the bankrupt act, it is positively provided that the discharge may be contested within two years after the date thereof, this must be taken as the limit, and the plea of the statute of limitations is a good plea. The opinion of TAFT, J., *Perkins v. Gray*, 3 N. B. R. 772, holding that a discharge may be attacked at any time for fraudulent concealment, disented from. *Pickett v. McGarick*, D. C. U. S. W. D. Ark., Albany L. J., June 3, 1876.

11. DESCRIBING CLAIM AS WORTHLESS WHICH BECOMES VALUABLE — JURISDICTION. — FUNDS OF BANKRUPT IN CUSTODY OF INTERNATIONAL COMMISSION, ETC. — If a bankrupt describes a claim as worthless, when he knows it to be of considerable value, or has reason to believe it to be of considerable value, a purchase made by him or for his benefit of his assets for a nominal sum, even after his discharge, at a sale by the assignee, would be considered fraudulent and void. If the claim was without value at the date of the bankruptcy proceedings, it might properly be described as worthless; and the fact that it afterwards became valuable through the power of the British government, who procured its allowance by the Treaty of Washington, in 1871, will not affect it in the hands of one who had purchased it at a sale by the assignee, made under the order and sanction of the bankruptcy court. The money which was paid to the British government upon awards made by the commissioners, under the treaty of 1871, is not in the jurisdiction of this court, nor can we compel the claimant to make an assignment thereof to his assignee in bankruptcy. The fund is to be regarded as under British dominion. Where an assignee in bankruptcy sold the assets of the bankrupt estate for a nominal sum — and among them was a claim against the United States, described as worthless, and which at the time was without foundation, but which was afterwards made valuable by the unforeseen circumstance of an award made by the commissioners under the treaty between Great Britain and the United States in 1871 — the title vested by such sale is valid when there is no fraud in the transaction. *Phelps v. McDonald*,<sup>1</sup> S. C. D. C., W. L. R., May 20, 1876.

#### BILLS AND NOTES.

1. LEX LOCI. — CHANGE OF LAW OF COUNTRY WHERE BILL IS MADE PAYABLE. — Where a bill of exchange is drawn and indorsed in one country and payable in another, the rights and liabilities of drawer and indorser are regulated by the law of the country where the bill is payable, and if the maturity of the bill is postponed by subsequent legislation in

<sup>1</sup> The opinion in this important case is by at great length. CARTER, C. J., and OLIN, WYLLIE, J., who discusses the points involved J., dissented. — EDITOR.

that country, the drawer's liability is also postponed, and presentation, &c., at the time when the bill would fall due in regular course is unnecessary. A bill dated 28th June, payable 5th October, 1870, was drawn and indorsed in England, accepted and payable in France. By a French law of 13th August, 1870, prolonged by subsequent decrees, the maturity of the bill was postponed until 5th September, 1871. It was then presented and protested, and notice given to all parties according to French law. The first indorsee paid the amount of the bill to a subsequent indorsee, and sued the drawers. *Held*, that the plaintiff was entitled to recover. *Roquette v. Overmann*, Ct. Q. B., Albany L. J., June 24, 1876.

2. PROTEST DAMAGES ARE RECOVERABLE only when protest is legally necessary to fix the liability of some party to the note or bill. Protest is not necessary to hold a guarantor, and therefore protest damages cannot be recovered in a suit by the payer of a note against the maker and guarantors. *Wooley v. Van Volkenburgh*, S. C. Kans., Cent. L. J., June 23, 1876.

3. RAISED CHECK. — EFFECT OF CERTIFICATION. — A check for \$20, drawn on the First National Bank of Houston, was fraudulently altered and raised by the payee to \$2,000. It was purchased of him by J. & Co., who indorsed it to their agents, the City Bank of Houston, who presented it to the First National Bank, and it was by said bank pronounced good. In the usual course of business it was taken up by the First National Bank in the exchange of checks after bank hours. The City Bank thereupon gave J. & Co. credit for the amount. The forgery was not discovered until the next month, on the balancing of the accounts between the two banks. *Held*, that the National Bank was entitled to recover the amount from the City Bank, as money paid under a mistake of fact. The indorsement of the check by J. & Co., and by defendant, was a warranty that it was genuine, and the payment being made under a mistake, and to a party who substantially contracted that there was no such mistake, the bank, being under no such obligation, and not being otherwise estopped, is entitled to recover the money. The loss having been incurred by J. & Co., the purchasers of the check, at the time they purchased it, the subsequent mistake of the plaintiff in paying it to defendant, the agent of J. & Co., should not shift the loss, unless defendant or J. & Co. had been damaged by laches of plaintiff. The purpose of the presentation of the check to plaintiff by defendant, was simply to be informed as to the signature of the drawer and the state of his account. *City Bank of Houston v. First National Bank*, S. C. Tex., Albany L. J., June 8, 1876.

#### CERTIFICATION.

See **BILLS AND NOTES**, 3.

#### CHECK.

See **BILLS AND NOTES**, 3.

#### CONTRACT.

**LEX LOCI.** — CONTRACT SIGNED IN ONE PLACE TO BE COUNTERSIGNED IN ANOTHER. — A policy of insurance signed by the officers of the com-

pany in Missouri, but upon condition that it should not be valid unless countersigned by the company's agent in the city of New York, and there delivered to the insured upon payment of the premium, is a contract to be governed by the laws of the State of New York. *Todd & Co. v. State Ins. Co. of Mo.*, Ct. Com. Pl. Phila., Leg. Int., June 30, 1876.

See ATTORNEY AND CLIENT; BILLS AND NOTES.

### COPYRIGHT.

1. DEPOSIT OF TITLE WITHOUT DEPOSIT OF COPIES. — To secure a copyright of a book or dramatic composition it is essential that, after the title has been deposited, the book be published within a reasonable time, and two copies delivered to the librarian of Congress, as required by the Revised Statutes. No copyright is acquired unless these acts are duly performed. A failure in respect of either is fatal. *Boucicault v. Hart*,<sup>1</sup> C. C. U. S. S. D. N. Y., Chicago L. N., May 6, 1876; Am. Law Rec., June, 1876; Pittsb. L. J., May 31, 1876.

2. PUBLICATION OF MANUSCRIPT WITHOUT CONSENT OF AUTHOR. — The right of action conferred by section 4967 of the Revised Statutes, which provides that every person who shall print or publish any manuscript without the consent of the author, if such author is a citizen of the

<sup>1</sup> Mr. Justice HUNT writes as follows: —

"Of this idea section 4956 of the Revised Statutes affords an illustration. It had been enacted in the previous sections that a copyright should be secured to authors, designers, and composers, and in this section, a definition is given, in a negative form, of the persons entitled to the benefit of the law. 'No person shall be entitled to a copyright unless he shall, before publication, deliver or deposit with the librarian of Congress. . . . a printed copy of the title of the book, &c., nor unless he shall, also, within ten days from the publication thereof, deliver to the librarian two copies of the book,' etc. Any person shall be entitled to copyright who, before publication, first, shall deliver to the librarian a printed copy of the title of the book, and second, shall, within ten days after the publication thereof, deliver to the librarian two copies of the same. The book may not be printed or published when the title page is filed, and some right (inchoate, perhaps) seems intended to be secured as of that date, although an actual printing or publication is not then made. But the expression 'before publication,' is based upon the idea that a printing or publishing will soon occur. This is put into clear meaning by the next clause of the section, that the author shall not be entitled to copyright 'unless within ten days from the publication,' he shall deliver two copies to the librarian. This means that the author is required to publish his work, and after he has so published it, and within ten days, he shall deliver two copies to the librarian. It is not a fair interpretation of this section to hold, that the filing of the titles entitles to a copyright fully and absolutely, and that this may be defeated by a publication, and failure to deliver two

copies, but, as long as there is no publication, although it continue indefinitely, there is no lapse of the right.

"This construction is not permitted, either by that idea, which secures benefit to the author or inventor, upon the theory that the public is to be benefited, as well as himself, by his works, or by the principle pervading all this branch of the law of patents, trade-marks, and copyrights, that an author or inventor must put his claim into the form of a well defined specification, work or composition, and so place it upon record that he cannot alter it to suit circumstances, and so that other authors and inventors may know precisely what it is that has been written or invented. The idea that an inventor may secure a patent for an invention of which he should not be required to file a specification, would not be tolerated. He may file preliminary or precautionary papers until his invention shall be completed, he may amend his specifications, and he may obtain reissues. It was never heard, however, that he could conceal the particulars of his invention, and by filing a general statement of a discovery or improvement, cut off the rights and claims of others. The principle I conceive to be the same in regard to a copyright, and I hold that, to secure a copyright of a book or dramatic composition, the work must be published within a reasonable time after the filing of the title page, and two copies be delivered to the librarian.

"These two acts are, by the statute, made necessary to be performed, and we can no more take it upon ourselves to say that the latter is not an indispensable requisite to a copyright, than we can say of the former." — EDITOR.



United States, or resident therein, shall be liable to the author for all damages occasioned by such injury, is not affected by a deposit of the title of the manuscript, under the chapter concerning copyrights and a failure to take the other necessary step. The author's common law rights are not abridged by the statutory provision, but exist independently of it, and may be protected accordingly. *Id.*

#### CORPORATION.

See BANKRUPTCY, 1; PLEADING AND PRACTICE.

#### DAMAGES.

See BILLS AND NOTES, 2.

#### EVIDENCE.

1. MARRIED WOMAN'S WILL. — A DEVISEE IS NOT A COMPETENT WITNESS to prove the execution of a married woman's will made before the passage of an act making parties in interest competent. *Camp v. Stark*, S. C. Pa., Leg. Int., July 7, 1876.

2. INTERNAL REVENUE. — DISTILLER'S BOOKS AFTER SEIZURE. — The seizure, by the order of an executive officer of the government, of the books kept by a distiller, in obedience to the requirements of the statute, does not exclude them from use as evidence under the provisions of section 860 of the Revised Statutes, concerning private books and papers. *N. Y. v. A Distillery at Petersburg*, C. C. U. S. E. D. Va., Chicago L. N., June 24, 1876.

3. WHERE A DEAD BODY IS FOUND BELOW A BRIDGE WITHOUT ANY EVIDENCE TO SHOW THE CIRCUMSTANCES CAUSING THE DEATH, it is a question for the jury to determine, whether the deceased fell from the same by accident, or whether his fall was the result of his own negligence. The natural instinct which leads men to avoid injury and preserve life, is an element of evidence used in all questions touching the conduct of men. Motives, feelings and natural instincts are allowed weight, and constitute evidence for the consideration of courts and juries. *City of Scranton v. Dean*, S. C. Pa., Mo. West. Jur., July, 1876.

#### HOMESTEAD.

MOVING UPON REAL ESTATE AFTER JUDGMENT. — After a judgment has been recovered against him, a debtor cannot prevent the enforcement of the lien thereby created on his real estate, by moving thereon and occupying it as a homestead. *Bowker v. Collins*, S. C. Neb., Chicago L. N., July 1, 1876.

#### HUSBAND AND WIFE.

PROFITS ARISING FROM MONEY RECEIVED BY THE WIFE FROM HER HUSBAND AS GUARDIAN of children of a former wife cannot be claimed by the husband's creditors. *Kepler v. Davis*, S. C. Pa., Leg. Int., June 2, 1876; Pittsb. L. J., June 14, 1876.

## INJUNCTION.

See **BANKRUPTCY**, 5.

## INSURANCE.

1. **POWER OF AGENT. — VERBAL CONTRACT BY AGENT.** — An agent authorized to solicit applications to be forwarded for approval to the company, and to collect and transmit premiums, is not authorized to bind the company by a verbal contract to insure. The fact that the insured on a prior application had been told by the agent that he was insured from that time, and a policy so insuring him was subsequently issued, did not justify the insured in believing that the agent had power to bind the company. *Morse v. St. Paul Fire & Marine Ins. Co.*, S. C. Minn., Ins. L. J., June, 1876.

2. **PREMIUM NOTE NEGOTIABLE.** — The insured executed a note promising "to pay to the A Mutual Ins. Co. or order a sum for premium for insurance policy. And it is further agreed that if this note is not paid at maturity, the whole amount of premium on said policy shall be considered as earned, and the policy be null and void so long as this note remains overdue and unpaid. Interest at the rate of ten per cent. per annum until paid." *Held*, that this was a negotiable promissory note. *Kirk v. Dodge Co. Mutual Ins. Co.*, S. C. Wisc., *Ib.*

3. **CHANGE OF TITLE IN CONTRAVENTION OF POLICY. — CONVEYANCES MADE IN LIEU OF WILL. — REPRESENTATIONS OF AGENT.** — Where, by the terms of a fire policy, the sale or transfer of the insured premises, or a change in the title thereof by voluntary transfer or conveyance, cuts off all right of recovery upon the policy, a conveyance of the premises by the insured and his wife to S., who re-conveys to the wife, operates to cut off such right of recovery, notwithstanding it appears that the conveyances were made as a substitute for a will devising the property to the wife, and that it was not the intention to divest the insured of the entire title, but that he was to retain, and did retain, possession and control of the property after the conveyances as before.

The fact that after the execution of the conveyances, the wife, for the purpose of having the policy changed if necessary, went to the office of defendant's secretary and notified him that the conveyance had been made, and was informed by him that "it made no difference, and that no change was necessary;" and that upon being so informed she took no further steps in the premises, but suffered the policy to remain as it was, does not operate to preserve a right of action upon the policy to the insured in case of loss, or to confer one upon the wife, it not appearing that the policy had been assigned to her. *Langdon v. Minn. Farmers' Mut. Fire Ins. Ass.*, S. C. Minn., *Ib.*

4. **OMISSION TO NOTIFY INSURED. — RIGHTS OF INSURED TO TENDER PREMIUMS, ETC.** — When the officer of a company having authority, promises to notify the holder of a life policy which was in the company's possession when the premium is due, and omits so to do for the purpose of procuring a lapse, the owner has the right within a reasonable time after the omission to tender the amount, and such tender, and tender

again when the premium again becomes due, keeps the policy alive. *Leftie v. Knickerbocker Life Ins. Co.*, Ct. App. N. Y., Ib.

5. EFFECT OF THE LATE WAR UPON INSURANCE UPON LIVES OF RESIDENTS OF DIFFERENT SECTIONS. — A life insurance for a year was effected in 1847 at a certain premium, with the privilege of continuing the insurance from year to year on payment of a premium of equal amount before the end of each year; and it was provided that if any annual premium should not be paid within the time limited, the insurers should not be liable to pay the sum insured, and the policy should determine, &c. The insured paid the premiums yearly till 1861. He was an inhabitant of Virginia. The insurers were incorporated by the legislature of Pennsylvania, in which state their business was transacted. The civil war which broke out in 1861 disabled them from receiving, and the insured from paying, the premiums in that year and until 1865. Upon the termination of the hostilities, he inquired of them by letter what steps he must take to continue his insurance. They answered that it was forfeited for non-payment of the premium in 1861, and that it would not be revived by them. *Held*, that this answer dispensed with an actual tender of the premiums, and that the question of his right to continue the insurance ought to be decided as if he had tendered them with interest. *Bird v. Penn. Mut. Life Ins. Co.*, C. C. U. S. E. D. Pa., Ib.

#### INTERNAL REVENUE.

See EVIDENCE, 2.

#### JURISDICTION.

OF UNITED STATES COURT TO DECREE SALE OF RAILROAD, PART OF WHICH IS IN ONE STATE AND PART IN ANOTHER. — A mortgage was made by a railroad company whose road ran through parts of the states of Delaware and Pennsylvania, of all its property, franchises, &c., to trustees, to secure the payment of certain bonds; default was made in payment of the interest, and as the trustees declined to sell the Delaware franchises and the Birdsboro extension of the road, the plaintiff, a bondholder, filed a bill, asking for a decree directing the mortgaged premises to be sold as one property. *Held*, that the court had power to decree relief, notwithstanding that part of the railroad was in the State of Delaware. *Randolph v. Wilmington & Reading R. R. Co.*, C. C. U. S. E. D. Pa., Leg. Int., June 16, 1876.

See BANKRUPTCY, 8, 11; REMOVAL OF CAUSES, 2.

#### LEX LOCI.

See BILLS AND NOTES, 1.

#### LIMITATIONS.

ACTION FOR FRAUD. — A statute of Kansas provides that, "an action for relief on the ground of fraud may be brought only within two years

after the cause of action shall have accrued," and "the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." In an action brought for *damages* resulting to plaintiff from the fraudulent representations of defendant in and about the purchase by him of certain lands: *Held*, that it was an action not for *damages*, but for relief in the nature of damages, and therefore within the statute. *Young v. Whittenhall*, S. C. Kans., Cent. L. J., July 7, 1876.

#### MARRIED WOMAN.

See EVIDENCE, 1; HUSBAND AND WIFE.

#### MECHANICS' LIEN.

1. RELEASE OF LIEN TO ENABLE TRANSFER OF PROPERTY. — A mechanic who has filed a lien upon certain real estate for work and materials furnished in the erection of houses thereon, and releases it for the purpose of enabling the owner to secure a new loan, cannot afterwards claim to enforce the same lien as against the party making such loan upon the security of the property. *Phillips v. Gilbert*, S. C. D. C., W. L. R., June 17, 1876.

2. ELEVATOR. — A PERSON WHO CONTRACTS TO PUT INTO A BUILDING THE ENGINES, DRUMS, CAGES, and necessary attachments, and steam pipes of an elevator, is not such a contractor as will give the right to the person who furnishes the cages to him to put a mechanics' lien against the property for the price of the cage. It is only the contractor of the main or leading divisions of a building who has the power to bind it with a lien, and it is only persons making a contract with such a contractor that can file liens. *Schenck v. Uber*, S. C. Pa., Leg. Int., May 12, 1876.

#### MORTGAGE.

WHERE A STATE EXPRESSLY AUTHORIZES A CORPORATION TO MORTGAGE ITS REAL ESTATE, authority to mortgage its franchises cannot be implied. A mortgage was made of a railroad as then made or to be made. A later mortgage was created, under authority of a subsequent act of assembly, of a branch or extension of the original road. The special act provided that the later mortgage should be a first lien on the branch. *Held*, that a sale under the original mortgage must be exclusive of the branch. *Randolph v. Wilmington & Reading R. R. Co.*, C. C. U. S. E. D. Pa., Leg. Int., June 16, 1876.

See JURISDICTION.

#### MUNICIPAL CORPORATION.

AWARD OF CONTRACT FOR IMPROVEMENT OF STREET. — NOTICE PUBLISHED IN GERMAN. — A resolution of the city council awarding a contract for the improvement of a street, and directing the city auditor to enter into the contract with the bidder, is not a resolution of a "permanent or general nature," within the meaning of section 98 of the Municipal Code.

Where the preliminary ordinance for the improvement of a street, and

a subsequent order assessing its cost upon abutting lots, are duly passed by concurrence of two thirds of the members, it is not necessary, in order to constitute the work an improvement made by the concurrence of two thirds of the members of such council within the meaning of section 540 of the Municipal Code, that two thirds of such members should concur in the resolution awarding the contract to the successful bidder.

Where a statute of the state requires a publication to be made in a "newspaper," in the absence of any provision to the contrary, a paper published in the English language is to be understood as intended, and a publication in a paper printed in any other language, is not a compliance with the statute. *City of Cincinnati v. Bickett*, S. C. Ohio, Mo. West. Jur., July, 1876.

#### NEGLIGENCE.

1. RAILROAD. — FAILURE TO ARREST SPREAD OF FIRE ON COMPANY'S PROPERTY. — Where a locomotive engine attached to one of defendant's train communicated fire to combustible matter on the right of way of the defendant, and where such fire was seen by employees of the company in time to have extinguished it before it could escape from the right of way, and they permitted it to burn without attempting to put it out until it escaped to and consumed property on plaintiff's premises: *Held*, that defendant's employees were guilty of gross negligence, and that it was no answer that the locomotive was provided with the most approved apparatus to prevent the escape of fire, and that the employees in charge of the train were skillful and vigilant. *Kenney v. H. & St. J. R. R. Co.*, S. C. Mo., Cent. L. J., June 23, 1876.

2. INJURY TO PASSER-BY FROM BAD REPAIR OF PREMISES ADJOINING HIGHWAY. — The occupier of premises adjoining a highway is bound to keep them in such a state of repair that they shall not endanger passers-by. The occupier does not discharge himself of this duty by employing a competent person to repair the premises. Therefore, where the defendant had a lamp and lamp-iron projecting from his premises over the street, and had given orders to a competent contractor to repair it, but the contractor had done the work badly, by reason of which the lamp fell and injured the plaintiff: *Held*, that the defendant was liable. *Seemle*, the rule does not apply to latent defects or acts of wrongdoers. *Terry v. Ashton*, High Ct. Westm., Cent. L. J., July 7, 1876.

See ADMIRALTY, 1; RESPONDEAT SUPERIOR.

#### NOTICE.

See MUNICIPAL CORPORATION.

#### PLEADING AND PRACTICE.

PROCESS. — SERVICE ON CORPORATION. — Service on the agent of a corporation by *reading*, when the statute requires that a copy of the writ should be *left with* the agent, is insufficient to give the court jurisdiction. *Jordon v. Mo. Kan. & Tex. Ry. Co.*, S. C. Mo., Mo. West. Jur., June, 1876.

See ADMIRALTY, 2; BANKRUPTCY, 2, 3, 4, 5, 7; RECEIVER; REMOVAL OF CAUSES.

## PROTEST OF NOTE.

See **BILLS AND NOTES**, 2.

## PUBLIC POLICY.

See **ATTORNEY AND CLIENT**.

## RAILROAD.

See **JURISDICTION ; MORTGAGE**.

## RAISED CHECK.

See **BILLS AND NOTES**, 3.

## RECEIVER.

**RIGHT TO SUE WITHOUT LEAVE.** — In an action by a plaintiff against a railroad company in the hands of a receiver, to recover for being wrongfully ejected from the car, the giving of this instruction was held to be error: "The foregoing instructions are given upon the theory that plaintiff is entitled to maintain this action, but if you find that at or before the commission of the alleged injury by a decretal order of the United States circuit court, the defendant corporation passed into the hands of a receiver, and that in said order, among other things, it was decreed: 'That said receiver take full charge of all the property, income, profits, earnings and receipts of said Central Railroad Company of Iowa; and that the said receiver pay out of the income, receipts and earnings of the road, no debts or expenses of any kind without special order . . . except such as shall become due, belong to and come within the category and character of operating expenses of the railroad,' and you further find that no leave has been asked and given to prosecute this case, or against defendant, to and by the said United States circuit court, then you will find for defendant; but if no such leave has been given, or no such order and decree has been entered and made, and no such proceedings had, then you will not consider this branch of the case." *Allen v. Central R. R. Co. of Iowa*, S. C. Iowa, Cent. L. J., July 7, 1876.

## REMOVAL OF CAUSES.

1. **CONSTRUCTION OF ACT OF MARCH 3, 1875.** — W. E. Bondurant, of Mississippi, commenced suit against J. Bondurant, *et al.*, citizens of Louisiana, in the state court of the Thirteenth Judicial District, and obtained judgment against them and a decree recognizing a mortgage upon certain property. Some litigation having arisen between the warrantor of the plaintiff, Watson, and W. E. Bondurant, was determined adversely to Bondurant.

Subsequently the executrix of W. E. Bondurant, then deceased, took out an execution on the judgment in the state court and placed it in the sheriff's hands, and caused him to seize a tract of land in the possession of the plaintiff, Watson, as owner, claiming that it was covered by the judg-

ment against J. Bondurant, *et al.* Thereupon Watson sued out from the state court issuing the execution a preliminary injunction. Before answering to the merits of the suit for an injunction, the executrix, alleging herself to be a citizen of Mississippi (where the testator had resided), applied for a removal of the case into the circuit court of the United States. The state court denied her right and refused to make the order of removal. The executrix, disregarding the order of the state court, filed a transcript of the proceedings in the suit for an injunction in the circuit court of the United States, and served a rule on Watson's counsel to show cause why the injunction should not be dissolved with damages. *Held*, that the case was covered by the Act of March 3, 1875, and that it was properly removed. *Watson v. Bondurant*, C. C. U. S. La., Cent. L. J., June 28, 1876.

2. EFFECT OF FILING PETITION.—JURISDICTION.—AMENDMENT.—

In an action commenced in a circuit court of the State of Missouri, the defendant in due time filed its petition and bond in due form, asking for the removal of the cause from the state to a federal court, on the ground of prejudice and local influence. Pending the application for a change of forum, the plaintiff was permitted to amend his petition by reducing his claim to a sum less than five hundred dollars, and therefore the defendant's application for change of forum was refused. The parties went to trial and plaintiff had judgment. *Held*, (1.) That the circuit court erred in permitting plaintiff to amend his petition after an application for a removal of the cause had been regularly made. (2.) That after the making of such application, the circuit court had no jurisdiction to proceed further in the cause. (3.) That the defendant did not waive the question of jurisdiction by participating in the subsequent trial. *Stanley v. Chicago, Rock Island, & Pac. R. R. Co.*, S. C. Mo., Cent. L. J., July 7, 1876.

RESPONDEAT SUPERIOR.

INJURY CAUSED BY NEGLIGENCE OF SUB-CONTRACTOR.—By agreement between the Pittsburg Gas Co. and Wray, the latter undertook to dig a trench, in which to lay certain gas pipes of said company. The work was to be done under the supervision of the company's engineer. It was also part of the contract, that should Wray, at any time, neglect or refuse to supply a sufficiency of material or workmen to properly execute the work, the company might furnish the same, and charge Wray. By a sub-contract similar in its terms, except that if the work was not done to the satisfaction of the gas company's engineer, the contract was to be forfeited on two days' notice, Wray passed the job to Davis. Each of the contracts contained a covenant that the contractor should be responsible for all losses that might happen by reason of the carrying on of the work arising through negligence, mistake, or otherwise. In execution of his contract with Wray, Davis proceeded to dig the trench along Second Avenue, into which, on the night of October 9, 1873, the plaintiff fell and broke his leg, whereupon he sued Wray. *Held*, that the doctrine of *respondere superior* had no application and that defendant was not liable. *Wray v. Evans*, S. C. Pa., Leg. Int., July 7, 1876.

## TAXATION.

WHEN TAXES BECOME A LIEN ON REAL ESTATE. — Defendant on the 27th of October, 1868, conveyed lands to plaintiff by deed, containing a covenant that such lands "are free and clear from all incumbrances whatsoever." The assessors of the town in the previous June had assessed the lands to the occupant, and had in August completed their assessment roll and delivered it to the supervisor of the town. The board of supervisors of the county at a meeting, commencing November 9th, extended the tax upon the roll pursuant to law and delivered the roll with their warrant to the town-collector to whom plaintiff paid the tax assessed against such lands. *Held* (CHURCH, C. J., dissenting), that the assessment was not a lien at the time of making the conveyance, and that there was no breach in the covenant against incumbrances. *Barlow v. St. Nicholas National Bank*, Ct. App. N. Y., Albany L. J., July 1, 1876.

## TRUST DEED.

TRUSTEE NOT ENTITLED TO RENTS AND PROFITS. — Where a trust deed makes no stipulation in regard to the rents and profits, and contains no waiver of the right of redemption in the event of sale by the trustee, and the maker remains in possession; the maker not the trustee is entitled to the rents and profits until foreclosure. *Easley v. Tarkington*, S. C. Tenn., Chicago L. N., June 24, 1876.

## TRUSTS. .

A TRUST IS AN ACTIVE TRUST where by grantor's deed the *corpus* of her estate is vested in the trustees who were to take possession, receive, hold, invest in their own names, and control the estate, to enable them to carry out the trusts declared, the chief one of which is, to hold the estate for her natural life, and to pay over to her, whether covert or sole, the net interest, income and dividends thereof, and in such way that the estate should not be answerable for, or liable to, any charge, incumbrance, assignment, or anticipation by her, whether sole or covert, and that the trust should continue, whether she is sole or covert, and should not fail at the death of any future husband, with remainder to the use of her living child or children, as tenants in common. *Ash v. Bowen*, S. C. Pa., Leg. Int., June 2, 1876.

## WILL.

DESTRUCTION OF CODICIL. — ANIMO REVOCANDI. — The testator made a will, and afterwards married. Immediately after the marriage he executed a codicil to the will, making provisions for his wife, and in all other respects reviving, ratifying and confirming the will. Upon his wife's death he destroyed the codicil, being under the belief that the will would still remain operative.

The court held that the codicil was not destroyed *animo revocandi*, and granted probate of both will and codicil. *James v. Shrimpton*, Eng. Pr. Ct., Chicago L. N., July 1, 1876.

See EVIDENCE, 1; INSURANCE, 3.



## SUPREME COURT OF PENNSYLVANIA.

[March, 1876.]

INSTRUCTION TO JURY. — EXPRESSION OF OPINION BY JUDGE.

BURKE v. MAXWELL.

It is error for a judge to say to a jury that if he was in the jury box he would find certain facts, even if he afterwards qualifies the expression by charging that his views may be disregarded.

PAXSON, J. — The right of a judge to express an opinion upon the evidence, has been recognized in a number of cases. In *Ditman v. Commonwealth*, 11 Wright, 335, it was said by Thompson, J.: "It is not error upon the part of the court to express an opinion merely upon the facts of the case, if they are properly referred to the jury. It is often very proper to do so. It aids the jury and subserves the ends of justice. Care must always be taken, however, not to infringe the province of the jury, so as to relieve them from the full responsibility of pronouncing an intelligent judgment upon them for themselves." The judge has a right to aid the jury by an expression of his opinion upon the effect of the evidence, but not so as to mislead them, or control their deliberations; *Mahoney v. Evans*, 2 P. F. S. 80; and it must be done in such a manner as not to be one-sided or unfair; *Ralston v. Groff*, 5 P. F. S. 276. The learned judge who tried this case in the court below went far beyond any recognized rule in his discussion of the evidence. It may very well be that he regarded it as a case which, to some extent, justified him in influencing the jury. But even if such were his view, he went too far. There can hardly be a doubt but that his charge controlled the jury. It is true that near its close he told them that they were not bound by his views, and might disregard them, yet almost in the same breath he informed them that if he were in the jury box he would find against the plaintiff. This, taken into consideration with the whole tone and tenor of the charge, bore so heavily upon the plaintiff as to leave him scarce a chance, this way practically controlling the verdict.

When there is sufficient evidence upon a given point to go to the jury, it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty by the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided. The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him; deductions and theories not warranted by the evidence should be studiously avoided; they can hardly fail to mislead the jury and work injustice.

Tested by the principles I have indicated there was error in the portions of the charge referred to in the first, fourth, fifth, sixth, seventh, eighth, ninth and tenth assignments. We have no doubt the learned

judge intended to do exact justice, but he unwittingly stepped over the line. So far from the charge being a calm, impartial presentation of the evidence, some portions of it, at least, went far beyond the evidence; deductions and theories are drawn, which, if not wholly unsupported, should have been left for the jury. I have looked in vain through the testimony for anything to justify such expressions as these: "Again, we may naturally assume that he knew well of these transactions with Maxwell, and was a helper with him. . . . You may assume he made considerable efforts to induce them to subscribe to 2,250 shares. . . . We may naturally suspect he was paid in oil stock, and would have taken his chances, whether this stock would be worth \$7 per share." And again: "Burke admits as to the guarantee part of it; this paper is a sham." Mr. Burke was not examined, and the record utterly fails to disclose any such admission. It is needless to particularize further, similar errors run all through the charge.

*Judgment reversed.*

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#### NOTES OF NEW BOOKS.

THE SOUTHERN LAW REVIEW, July, 1876, St. Louis: G. I. Jones & Co. The last issue of this publication merits most cordial recognition. It is surprisingly good from first to last, and if it does not prove too brilliant will place the work at the head of our legal periodicals. The most noteworthy articles are the following: The removal of causes from State to Federal Courts, Hon. John F. Dillon; Stock Brokerage, Francis Wharton, LL. D.; Nolle Prosequi, Joel Prentiss Bishop; Incidental Injuries from the exercise of lawful rights, Thomas M. Cooley, LL. D.

WOOD'S REPORTS, VOL. II. (Reports of Cases determined in the Circuit Courts of the fifth circuit. By Wm. B. Woods, Circuit Judge) will be issued by Messrs. Callaghan & Co. during the coming fall or winter. This series promises to be one of exceptional value and interest.

MESSRS. COCKROFT & Co. of Chicago, have ready a new edition of *Dicey's Parties to Actions*, with American notes.

MESSRS. SUMNER WHITNEY & Co. announce *Wrongs and Rights of a Traveller*, by R. V. Rogers, and *The Philosophy of Law*, by Herbert Broom.

# THE AMERICAN LAW TIMES.

NEW SERIES. — SEPTEMBER, 1876. — VOL. III., No. 9.

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## DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

### ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & Co.  
Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.  
Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & Co.  
Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH  
Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.  
Daily Reg. — *Daily Register*, New York, 303 Broadway.  
Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.  
Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.  
La. L. J. — *Louisiana Law Journal*, New Orleans, La.  
Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.  
Leg. Gaz. — *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.  
Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.  
Mo. West. Jur. — *Monthly Western Jurist*, Bloomington, Ill., T. F. TIPTON.  
N. B. R. — *National Bankruptcy Register*, New York, CAMPBELL & Co.  
Pac. Law. Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.  
Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.  
W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.  
West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & Co.

### ADMINISTRATOR.

See ESTOPPEL.

### ADMIRALTY.

**SALVAGE.** — FIREMEN EMPLOYED AND PAID UNDER A CITY ORDINANCE are not entitled to salvage for vessels saved while lying at the wharves of the city by which they are employed. *Davey v. The Mary Frost*, D. C. U. S. E. D. Texas, Cent. L. J., June 30, 1876.

### ARBITRATION.

**AGREEMENT TO ARBITRATE.** — **CONDITION PRECEDENT.** — The defendant covenanted with the plaintiffs, his landlords, to keep so much ground-game only as would do no injury to the landlords, and in case he should keep such a number as to do injury, to pay a fair and reasonable compensation, the amount of such compensation to be referred to arbitration. *Held*, reversing the judgment of the court of exchequer, that ref-

erence to arbitration was not a condition precedent to the defendant's liability under the covenant. *Dawson v. Fitzgerald*, Eng. Ct. App., Cent. L. J., July 28, 1876.

#### ATTACHMENT.

**SALE. — WHAT INTEREST PASSES. — REPLEVIN.** — Proceedings in attachment against personal property are against the interest of the defendant in attachment, and those claiming under him in the thing attached; and a person whose goods have been seized improperly, and who is no party to the suit, is not concluded by the judgment. Replevin is the proper remedy against a sheriff who has levied a writ of attachment against one person upon the property of another. *Samuel v. Agnew*, S. C. Ill., Chicago L. N., July 22, 1876.

#### BANK.

**A CASHIER HAS NO GENERAL AUTHORITY** whatever to bind a bank by his statements. *Daviess Co. Savings Ass. v. Sailor*, S. C. Mo., Chicago L. N., July 8, 1876.

#### BANKRUPTCY.

**1. MORTGAGE CREDITOR. — FAILURE TO PROVE CLAIM. — STATE COURT.** — A mortgage creditor who did not prove his debt may enforce his mortgage in a state court, although the property was duly set apart to the bankrupt as exempt. *Cumming v. Clegg*, S. C. Ga., 14 N. B. R. No. 2.

**2. A JUDGMENT CREDITOR WHO LEVIED UPON PERSONAL PROPERTY, AND SUBSEQUENTLY ABANDONED HIS LEVY** by permitting the property to go back into the hands of the defendant, may enforce his lien against land sold by the bankrupt before the commencement of the proceedings in bankruptcy, and need not follow the personal property into the hands of the assignee. *Winship v. Phillips*, Ib.

**3. WHERE DEBTOR'S AND CREDITOR'S RIGHT TO REDEEM ARE INDEPENDENT.** — Where the right of a creditor and the right of a debtor to redeem property sold under an execution are, under the state law, distinct and independent, the bankruptcy of the debtor does not affect or extinguish the right of the creditor. *Trimble v. Williamson*, S. C. Ala., Ib.

**4. IF AN ASSIGNEE MAKES A SALE OF PROPERTY, BUT REFUSES TO DELIVER THE POSSESSION** thereof, he is liable to an action at law, if the sale has never been brought to the attention of the bankrupt court, nor in any manner acted on by it. *Ives v. Tregent*, S. C. Mich., Ib.

**5. DISPUTED INTERESTS OF THE BANKRUPT CANNOT BE SOLD UNDER SECTION 25** of the General Bankruptcy Act (section 5063 of the Revised Statutes), except by order of court, after personal notice to the adverse claimants of the disputed interests. Where the assignee's petition for the private sale of such an interest, an order by the register for such a sale, and the assignee's report of the sale, are all made on the same day, the order is void and the sale a nullity. The section mentioned intrusts the court, and the court alone, with discretion whether to sell or not; and, if

determining to sell, intrusts the court, and the court alone, with discretion as to the period of notice to be given to those claiming adversely. Notice of the petition for the sale of such an interest must be given, personally, to those claiming adversely, and the sale must be public and after public notice. *In re Major*, D. C. U. S. E. D. Va., *Ib.*

6. FRAUDULENT SALE. — CONFIRMATION OF IRREGULAR REPORT, ETC. — Where an illegal order of sale has been made by a register, and the report of sale under it has been approved by the register, without opportunity being given for exceptions, and the order and the report of sale have been withheld from being filed for six weeks after these transactions, the indorsements upon the order, and the report of the word "approved," by the judge, made some time during the six weeks, which were never treated by the clerk as memoranda for orders of confirmation, do not constitute, and are not orders of confirmation. Even if the confirmation had been regular, such an order of the register being void could not by confirmation be made valid, nor could the sale under it be made valid. Such a sale being null and void, the bankruptcy court has jurisdiction to declare it so, as well against the purchaser from the assignee, as against persons to whom the purchaser has assigned his interest, if those persons be brought in by petition. A plenary bill is not necessary to bring in such persons. *Ib.*

7. NUMBER OF CREDITORS. — CORPORATION. — The same number and amount of creditors must join in proceedings against a corporation as against an individual. *In re Leavenworth Savings Bank*, C. C. U. S. Kas., *Ib.*

8. ACT OF 1874 NOT RETROACTIVE. — The amendments of 1874, so far as they change the existing law in reference to the rights of assignees to recover property transferred in contravention of the bankrupt act, and in reference to the proof of debts by creditors who have taken a preference, are not retroactive, and do not apply where the proceedings in bankruptcy had been previously commenced. *In re Lee*, D. C. U. S. N. D. N. Y., *Ib.*

9. A PREFERRED CREDITOR WHO RECEIVES A PREFERENCE ON ONE OF TWO CLAIMS may prove the other. *Ib.*

10. EXEMPTION. — CHANGE OF STATE LAW DURING 1871. — If the state law was changed during the year 1871, the exemption can only be allowed according to the law that was in force at the close of the year. *In re Baer*, D. C. U. S. N. D. Ohio, 14 N. B. R. No. 3.

11. A PROCEEDING TO REVIVE A JUDGMENT may be stayed. *Bratton v. Anderson*, S. C. So. Ca., *Ib.*

12. SEC. 39 NOT PENAL. — EFFECT OF REPEAL, ETC. — Those clauses of the bankrupt law which authorize an assignee to recover the amount of unlawful preferences paid to particular creditors are not in their nature penal, and their repeal is not subject to the rule of construction applicable to the repeal of penal statutes. The cases *Vorhees v. Frisbie*, 8 N. B. R. 152; 25 Mich. 476; *Bingham v. Clafin*, 7 N. B. R. 412, which decide that this clause of the bankrupt law is penal, and therefore will not be enforced in the state courts, disapproved, and the cases *contra* cited and acquiesced in. Judgments holding that statutes imposing liability upon corporators in certain exigencies for debts of the corporation were penal,

and consequently would not be enforced in other states, held not to be analogous to this clause of the bankrupt law. *Tinker v. Van Dyke*, C. U. S. E. D. Mich., *Ib.*

13. CHATTEL MORTGAGE. — FAILURE TO TAKE POSSESSION. — A chattel mortgage given for a present consideration, and good between the parties, is not rendered invalid as against the assignee by failure to file the same, or take possession of the property, until a month before the commencement of proceedings in bankruptcy, notwithstanding the mortgagee knew the mortgagor to be insolvent, and that the instrument gave him a preference. *In re Abram*, D. C. U. S. E. D. Mich., *Ib.*

14. RECEIVER. — APPOINTMENT, POWERS OF, ETC. — A receiver may be appointed after an adjudication of bankruptcy, and before the selection of an assignee for the temporary care and custody of the estate, when special circumstances render it desirable.

A receiver cannot maintain an action to recover the value of property sold by the bankrupt, in fraud of the bankrupt law, prior to the commencement of the proceedings in bankruptcy. If a receiver institutes a suit to recover property sold by the bankrupt in fraud of the bankrupt law, prior to the commencement of the proceedings in bankruptcy, the assignee will not on motion be admitted to prosecute such suit. *Lansing v. Manton*, D. C. U. S. N. D. N. Y., *Ib.*

15. AN ATTACHING CREDITOR MAY INTERVENE to contest an adjudication upon the merits, as well as to claim the court has no jurisdiction of the case. *In re Williams*, D. C. U. S. E. D. Mich., *Ib.*; *In re Scrafford*, D. C. U. S. Kas., 14 *Ib.* No. 4.

16. CREDITORS WHO HAVE OBTAINED A PREFERENCE BY A BILL OF SALE from the debtor are estopped to set up the execution of the same as an act of bankruptcy. *Ib.*

17. CREDITORS WHO HAVE TAKEN POSSESSION of the entire property of a debtor, under a general assignment or bill of sale, intended to prefer them, cannot set up the non-payment of a note as an act of bankruptcy. *Ib.*

18. TROVER TO RECOVER VALUE OF PROPERTY SOLD BEFORE COMMENCEMENT OF PROCEEDINGS. — An action of trover will not lie by an assignee against a judgment creditor, to recover the value of property sold under an execution prior to the commencement of the proceedings in bankruptcy. *Gates v. American*, C. C. U. S. N. D. Ill., *Ib.*

19. A RESOLUTION OF COMPOSITION, WHICH PROVIDES THAT THE PAYMENT SHALL BE GUARANTEED BY A SATISFACTORY BOND to certain persons, as a committee of creditors, may be confirmed. *In re Lewis*, D. C. U. S. S. D. N. Y., *Ib.*

20. THE MERE PROOF OF A DEBT IS NOT A BAR TO AN ACTION THEREFOR, instituted after the proceedings in bankruptcy are terminated. *Miller v. O'Kain*, S. C. N. Y., 14 N. B. R. No. 4.

21. THE SPECIFICATIONS IN OPPOSITION TO A DISCHARGE must be precise and definite. *In re Butterfield*, D. C. U. S. N. D. Ill., *Ib.*

22. IF A BANK RECEIVES DRAFTS FOR COLLECTION, it may retain the proceeds towards the payment of a debt due to it by the owner of the drafts, although they were collected after his bankruptcy. *In re Farnsworth, Brown & Co.*, *Ib.*

23. THE COMPENSATION OF THE ASSIGNEE'S ATTORNEY must be reasonable and proportioned to the value of the estate. *In re Drake*, D. C. U. S. N. J., *Ib.*

24. IF AN INSOLVENT DEBTOR TRANSFERS HIS PROPERTY TO ANOTHER, and the latter executes a mortgage thereon to secure a creditor, the transfer may be set aside. *Gibson v. Dobie*, C. C. U. S. E. D. Wisc., *Ib.*

25. A PARTY WHO PURCHASED AN IMPORTED ARTICLE DUTY FREE, and was compelled to pay the duty in order to get possession thereof, is entitled to priority, although he has proved his claim as unsecured. *In re Kirkland, Chase & Co.*, D. C. U. S. Md., *Ib.*

26. "COMMERCIAL PAPER." — A NOTE GIVEN BY ONE PARTNER, on the settlement of a copartnership business as manufacturers, to pay for the interest of the copartner in the business, and to settle the balance appearing against him, is not the commercial paper of a manufacturer, issued in the course of his business as such. *In re Lanz*, D. C. U. S. Minn., *Ib.*

27. PREFERENCE.—OVER-DRAFT, PURCHASE OF CERTIFICATES, ETC.—If a debtor purchases gold certificates by means of an over-draft on a bank, under an agreement that the certificates should be the property of the bank, or with the preconceived idea of never paying back the money obtained by the over-draft, but of defrauding the bank, a transfer of the certificates to the bank is not an act of bankruptcy. If a bank merely certifies the check of a debtor in advance, relying on his promise to make his account good during the day, such an over-draft, in the absence of fraud, creates simply the relation of debtor and creditor, and the payment of such a debt after insolvency occurs is an act of bankruptcy. A mere agreement by a debtor, that in a certain event he will deliver to the bank such securities as he may purchase with the proceeds of an over-draft, will not vest a title to the securities in the bank, so that a transfer of them will not be a preference. There is a distinction between an agreement that securities purchased with the proceeds of an over-draft shall all the time be considered the property of the bank, and an agreement to turn over the title as a future act. Where the defence is that the securities belonged to the alleged creditor on account of fraud, the burden of proof is on the debtor to establish the fraud and the identity of the securities by a fair preponderance of evidence. *Payne v. Solomon*, D. C. U. S. So. D. N. Y., *Ib.*

28. A RESOLUTION OF COMPOSITION WHICH DOES NOT PROVIDE FOR THE EXPENSES OF AN ATTACHMENT may be confirmed if there has been no first meeting of creditors and no appointment of an assignee. *In re Clapp & Co.*, D. C. U. S. Mass., *Ib.*

29. A RESOLUTION OF COMPOSITION WHICH IS PASSED WITHOUT CALLING THE FIRST MEETING of creditors and electing an assignee does not dissolve an attachment issued within four months before the commencement of such proceedings. *Ib.*

#### BILLS AND NOTES.

PROMISSORY NOTE DEFINED.—An instrument as follows:—

"\$650.00

TRENTON, Mo., May 13, 1874.

Ninety days after date we promise to pay to the order of Robert L. Gililan six hundred and fifty dollars for value received, with interest after

maturity, at the rate of ten per cent. per annum, at the First National Bank of Trenton, Mo., and if not paid at maturity, and the same is placed in the hands of an attorney for collection, we agree and promise to pay an additional sum of ten per cent. as an attorney's fee." *Held*, not to be a promissory note. *First Nat'l Bank v. Gay*, S. C. Mo., Cent. L. J., July 21, 1876.

#### BOARD OF TRADE.

See MANDAMUS.

#### CASHIER.

See BANK.

#### COMMON CARRIER.

1. INJURY TO PASSENGER THROUGH GETTING OFF TRAIN WHILE IN MOTION. — Plaintiff, at the time the injury complained of was received, was an infant. His father, in whose care he was, purchased tickets for himself and son on the night train from St. Louis to Salem, a station at which this train did not usually stop. He was assured, however, by an officer of the road, that on this night it would stop at Salem. Father and son took the train on this assurance. As it was being checked up on nearing that station, passengers began to get ready to leave the car, when the superintendent called out in a loud voice, "Don't get off till the cars stop." This the plaintiff and his father did not hear, as they were on the platform. Before the cars had stopped, they jumped off, and plaintiff was injured. *Held*, that the father was guilty of negligence, and plaintiff could not recover. *Ohio & Miss. R. R. Co. v. Stratton*, S. C. Ill., Cent. L. J., June 30, 1876.

2. NEGLIGENCE OF PARENT. — The negligence of the parent or guardian, having in charge a child of tender years, does not excuse the carrier from using all the means in his power to prevent an injury. But if the negligence of the former were the proximate cause of the injury to the child, by unnecessarily and imprudently exposing it to danger, the carrier will not be responsible. *Id.*

3. NEGLIGENCE OF CARRIER. — LOSS BY ACT OF PUBLIC ENEMY. — MEASURE OF DAMAGE. — INTEREST. — An action of assumpsit was brought to recover of defendant the value of a package of Confederate money and Tennessee bank notes delivered to it in April, 1862, at Jackson, Tennessee, consigned to parties in New Orleans, Louisiana. At the time of the delivery, plaintiff was a resident of Henry County, Tennessee, then under Confederate dominion and control. Plaintiff sent the package by an agent to Jackson, Tennessee, where it was delivered to defendant on the 23d of April, 1862, but before it reached New Orleans the city was captured by the federal forces, and after a delay of about six weeks, in the hope it might be delivered to the consignee, it was returned to Jackson, where it was soon afterwards captured in the occupation of the town by the federal troops. Before it was returned to Jackson, the army had advanced so far southward that communication with plaintiff's residence was impossible, Henry County being then wholly occupied by the invading army. Evidence was offered tending to show negligence on the part of defendant in its care of the package after its return to Jackson, and in



failing to withdraw it on the advance of the federal troops, and the court charged the jury among other things: 1. That the defendant was bound to take the same care of plaintiff's package that it did of its own property, and if its loss was occasioned as well by the neglect of the defendants in this regard as by the act of the Union forces, the defendant was liable. 2. That the measure of damages was the value of the package at the time of its loss, with interest thereon from that date. *Held*, that there was no error. *Caldwell v. So. Express Co.*, C. C. U. S. W. D. Tenn., *Ib.*

#### CONDITION PRECEDENT.

See ARBITRATION.

#### CONSTITUTIONAL LAW.

1. "LOCAL OPTION" LAWS "SPECIAL" LAWS. — The Constitution of Illinois contains a provision whereby the general assembly is prohibited from passing "any local or special law incorporating cities, towns, or villages, or changing or amending the charter of any town, city, or village." This provision being in force an act was passed in the following words: "The city council of any city shall have power at any time, in lieu of the mode herein provided for the assessment and collection of general city taxes, to, by resolution or ordinance, elect to certify to the county clerk the amount or amounts required to be raised by taxation upon the assessment of property for state and county taxes, and to collect the taxes for said city in the manner provided for in the general revenue laws of this state, and in such case to abolish the office of the city assessor and city collector. Provided, however, that nothing in this section contained shall be so construed as to prevent such corporation at any time thereafter from providing for the assessment and collection of taxes by ordinance, and in the manner in this act herein before set forth." *Held*, that the act was unconstitutional. *People v. Cooper*, S. C. Ill., Chicago L. N., July 8, 1876.

2. EXEMPTION FROM TAXATION. — CHARTER OF CORPORATION. — OBLIGATION OF CONTRACTS. — The exemption in the amendment to the charter of the Northwestern University, to the effect "that all property, of whatever kind or description, belonging to or owned by said corporation, shall be forever free from taxation, for any and all purposes," is unconstitutional and void, in so far as it attempts to exempt from taxation any other property than that which is directly used for educational purposes. It was not competent for the general assembly, under the Constitution of 1848, which was in force at the date of this amendment, to grant an exemption so broad and sweeping in its character. The general principle upon which taxation was required to be levied by the Constitution of 1848 was that of uniformity, and exemptions were exceptional, and therefore to be construed strictly. Such exemptions are in derogation of public right; there are no presumptions in their favor; and every reasonable doubt should be resolved against them. It not being competent for the general assembly to make the exemption, the attempt was a nullity, and the case is not affected by the provision of the Constitution of the United States forbidding the impairing of the obligation of

a contract. *Northwestern University v. The People*, S. C. Ill., Chicago L. N., July 15, 1876.

3. AN ACT REGULATING THE TAKING OF DEPOSITIONS IN A PARTICULAR COUNTY is an infraction of a constitutional provision to the effect that the legislative power shall pass no law for any case for which provision can be made by a general law. *State v. Wallbridge*, S. C. Mo., Cent. L. J., July 21, 1876.

#### CONSTRUCTION OF STATUTES.

"LOWEST RESPONSIBLE BIDDER" DEFINED. — INJUNCTION. — An act provided that contracts of the city of Philadelphia should be awarded to the "lowest responsible bidder." Plaintiffs were the lowest bidders and accompanied their bid by proof of their pecuniary responsibility. Their bid was rejected, whereupon they filed their bill for an injunction to restrain the letting of the contract to higher bidders. The answer did not deny the pecuniary responsibility of plaintiffs. *Held*, that the injunction should go. *Gutta Percha Co. v. Stokely*, Mayor, Ct. Com. Pl. Phil., Leg. Int., July 21, 1876.

#### CONTEMPT.

LIBEL UPON GRAND JURY. — The publication of a libel on a grand jury, or on any of the members thereof, because of an act already done, cannot be summarily punished as a contempt. *Storey v. The People*,<sup>1</sup> S. C. Ill., Mo. West. Jur., August, 1876.

#### CONTRACT.

1. A CONTRACT HAVING FOR ITS CONSIDERATION AN AGREEMENT TO SUPPRESS A CRIMINAL PROSECUTION IS VOID. — It is equally so, if any part of the consideration was the suppression of the prosecution, and whether the contract was induced by promises or threats on one side or the other. It is not necessary that the promise should be made at the same time as the contract; it is sufficient if it was made prior thereto, and was acted upon as a part of the consideration or inducement. Nor does it make any difference that a prosecution is already commenced and is in the hands and under the control of the commonwealth's officer, if the private prosecutor, as consideration for the contract, promises to abandon his own efforts in the course of justice. The particular interest of

<sup>1</sup> In this case Judge SCHOFIELD, who delivered the opinion of the court, writes: "The law of libel at common law left the jury to determine whether the defendant was guilty of the publication alone; but the question of whether the publication was libellous was for the court, and it was admissible to show by evidence that the publication was true, or the motive with which the publication was made. Whether, therefore, the party charged with the libel was tried by a jury or proceeded against summarily as for contempt, the only question of fact was, whether he was guilty of the publication. In this state, however, our Constitution guarantees 'that every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty; and, in all trials

for libel, both civil and criminal, the truth, when published with good motives and justifiable ends, shall be a sufficient defence.' This language, plain and explicit as it is, cannot be held to have no application to courts or those by whom they are conducted. . . . There is, therefore, the same responsibility, in theory, in the judicial department, that exists in the legislative and executive departments, to the people, for the diligent and faithful discharge of all duties enjoined on it; and the same necessity for public information with regard to the conduct and character of those intrusted to discharge those duties, in order that the elective franchise shall be intelligently exercised, as obtains in regard to the other departments of the government." — EDITOR.

the party injured in bringing the offender to justice is one of the securities of the public in the enforcement of the laws, and any agreement by which this interest is turned against the commonwealth is void. *Kimbrough v. Lane*, Ct. App. Ky., Am. Law Reg., July, 1876.

2. RESTRAINT OF TRADE. — An agreement by the grain merchants of a city to regulate the price of grain is in restraint of trade, and will not be enforced in equity. *Craft v. McConnoughy*, S. C. Ill., Mo. West. Jur., August, 1876.

See ARBITRATION ; DAMAGES, 2.

#### CORPORATION.

See CONSTITUTIONAL LAW, 2.

#### CRIMINAL LAW.

AGREEMENT TO ENTER NOLLE PROSEQUI. — Bowden and one Arnold were jointly indicted for burglary. The then district attorney, believing Arnold to be the guilty party, and that he could not be convicted without the testimony of Bowden, agreed to enter a *nol. pros.* as to Bowden, if he would appear as witness for the state and testify to all he knew about the case. With the consent of the court, the *nol. pros.* was entered, and Bowden recognized as a witness for the state. The defendant Arnold was convicted on another indictment, and at a subsequent term of the court, Bowden was again indicted by the grand jury for the same offence. *Held*, that the agreement by the district attorney was binding upon the state, and that defendant could not be tried. *Bowden v. The State*, S. C. Tex., Cent. L. J., August 4, 1876.

#### DAMAGES.

1. THE MEASURE OF DAMAGE FOR DEATH OF AN ADULT MALE is the probable amount of the accumulation of the deceased during his life as it would presumably have been passed, reference being had to his age, habits, bodily health, and ability, without regard to the character or wants of the beneficiaries. *Kansas Pac. R. R. Co. v. Lundon*, S. C. Col., Cent. L. J., June 30, 1876.

2. DAMAGES FOR BREACH OF CONTRACT. — The measure of damages for a breach of contract to deliver goods is the difference in price of that precise kind of goods at the time and place of performance. *In re North*, D. C. U. S. Mass., Cent. L. J., August 4, 1876.

See COMMON CARRIER, 3.

#### DEED.

VOLUNTARY CONVEYANCE. — PAROL TESTIMONY TO EXPLAIN DEED. — TRUSTS. — Where lands are conveyed by one to another, they being in law *strangers*, and the deed purports to be for a valuable consideration, it is competent to prove by parol that such conveyance was, in fact, voluntary ; and if there be nothing otherwise to show that the transaction was a gift, the law will imply that the grantee received and holds the property in trust for the grantor. *Bayles v. Crossman*, Superior Ct. Cin., Am. Law Rec., July, 1876.

## DOWER.

**ACCEPTANCE OF ANNUITY, ETC., NOT A RELINQUISHMENT OF DOWER. — SENIOR AND JUNIOR WIDOW, ETC. —** A father died, leaving a widow. His homestead descended to his two sons. In consideration of their having the use and income of the whole estate, the sons, in writing, promised the widow an occupancy of a portion of the premises, and certain farm stock for her use, and a certain yearly payment. Afterwards, one son conveyed to the other. The latter then conveyed the entire premises to his mother by a warranty deed. Then he died, leaving a widow. In an action of dower by the widow of the son, against the widow of the father, it was *held*: 1. That the agreement between the sons and the mother did not operate either as an assignment of dower to her or as a release of dower by her. 2. That the condition of the senior widow, as to her own dower, is the same, essentially, as if it had been specially assigned to her. 3. That her right of dower was not extinguished by merger in the fee conveyed to her by her son. 4. That she is not estopped by the covenants of warranty in such deed from availing herself of her right of dower in this action; inasmuch as such right was paramount to and independent of the title procured by the deed. 5. That there are two dowers in the estate; the senior widow having one third of the whole, and the junior widow one third of the remaining two thirds, as dower; and that the junior widow is not now, nor will she be at the death of the senior widow, dowable in any greater proportion thereof. *McLeery v. McLeery*, S. C. Me., Am. Law Reg., July, 1876.

See ESTOPPEL.

## EQUITY.

**PARTNERSHIP. — RIGHTS OF CREDITORS WHERE DECEASED PARTNER MADE FRAUDULENT CONVEYANCE. —** The bill in this case alleged that appellant and R. were in partnership; that appellant had an excess of capital in the firm, which was insolvent; that R. died insolvent, and his estate is that of an insolvent; that he made a will devising his estate in equal parts to his wife and his brother James R. That C. had administered on his estate, and in due course of administration, appellant, as surviving partner, had the claim of the late firm allowed in the probate court for \$2,746.58; that he proved his individual claim; that the assets of the estate do not exceed \$3,069.80, of which \$1,580 was set off to the widow. That the demands against the estate amount to \$4,060.30; that R. being insolvent, with \$2,050 of the firm money, purchased a lot, and had it conveyed to his wife, alleging, as a reason, that he was insolvent, and would thus be able to retain a home: *Held*, 1. That this was a fraud against which equity would afford relief in favor of creditors. 2. That when a claim is allowed in a probate court against an insolvent estate, equity will take jurisdiction to remove fraudulent conveyances, and subject the property to the payment of the debts of the deceased. *White v. Russell*, S. C. Ill., Chicago L. N., July 8, 1876.

## ESCROW.

See MORTGAGE.

## ESTOPPEL.

**ADMINISTRATOR'S SALE OF REAL ESTATE. — PRESENCE AND ASSENT OF WIDOW TO SALE FREE OF DOWER.** — Where an administrator put up the real estate of a decedent for sale, representing that it was free from incumbrance, and that he would make a legal title, and the widow of the deceased was present and assented to it, stating that it would be sold free from her claim of dower, and it was purchased upon such representations: *Held*, that the widow was estopped from afterwards claiming dower in the premises sold. *Sweany v. Mallory*, S. C. Mo., Cent. L. J., July 21, 1876.

## EVIDENCE.

**PAROL EVIDENCE TO VARY TERMS OF WRITTEN INSTRUMENT.** — The English rule, that parol evidence is inadmissible to vary the terms of a written instrument, does not exist in the State of Pennsylvania. A number of authorities settle the doctrine that in cases of fraud or mistake as to material facts, parol evidence of what occurred at the execution of the writing is competent to explain the real meaning of the parties. *Kostenbader v. Peters*, S. C. Pa., Leg. Int., July 21, 1876.

See DEED; LIBEL, 1, 2.

## EXEMPTIONS.

**THE MEMBERS OF AN INSOLVENT FIRM ARE NOT ENTITLED TO the statutory exemptions out of the partnership property, after it has been seized in execution by partnership creditors, notwithstanding all the members join in demanding the exemptions.** *Gaylord v. Imhoff*, S. C. Ohio, Am. Law. Rec., July, 1876.

## GARNISHMENT.

**FOREIGN JUDGMENT. — FAILURE TO MAKE DEFENCE.** — M., a resident of Iowa, had a claim for wages (exempt by the laws of that state from garnishment) against defendant, a railway company existing under the laws of Iowa and Illinois, and running its lines also into Missouri and Kansas. In an attachment suit brought against M. in Missouri, the said company was garnished for the amount of its indebtedness to M. and final judgment rendered against it. M. had no actual notice of the proceedings, but was served by publication under the laws of Missouri. In an action brought against the company by M. on his claim for wages, *held*, that the judgment in the attachment proceeding was a complete bar to the suit. *Moore v. C., R. I. & P. R. R. Co.*, S. C. Iowa, Cent. L. J., July 21, 1876.

## INJUNCTION.

**NEGLIGENCE OF STREET RAILWAY COMPANY TO KEEP STEETS IN REPAIR ACCORDING TO ITS CHARTER. — POWER OF CITY OFFICIAL TO STOP RUNNING OF TRAINS. — RIGHTS OF CITIZENS INCONVENIENCED, ETC.** — A passenger railway company, by its charter bound by the city ordinances relative to keeping the streets along its line in good repair,

having neglected this duty, was duly notified by the commissioner of highways to make repair, and neglected to do so. The commissioner proceeded to make the repair, and poled off the street, stopping the running of the cars. The railway company brought their bill for an injunction. *Held*, that being derelict they had no right to the remedy invoked; that the commissioner of highways might stop the running of the cars when necessary to make repairs; and that private individuals, residing on the line and using it, although greatly inconvenienced by the stoppage of the cars, had no standing in a court of equity against the city authorities. *Phila. & Gray's Ferry Pass. R. R. Co. v. City of Phila.*, Ct. Com. Pl. Phila., Leg. Int., July 21, 1876.

See CONSTRUCTION OF STATUTES.

### INSURANCE.

1. CONSTRUCTION OF WORD "FALLEN" IN POLICY. — WHERE THE BUILDING WAS BLOWN PARTLY FROM THE POSTS ON WHICH IT RESTED, was leaning out of plumb, and so far rendered unfit for occupancy that most if not all the foundation was removed, but remained united, and admitted of repairs though greatly damaged, it was held that the building had not "fallen" within the meaning of a policy clause voiding the insurance in case the building should fall. *Fireman's Fund Ins. Co. v. Congregation of Rodeph Sholem*, S. C. Ill., Ins. L. J., July, 1876.

2. INTEREST ON PREMIUM NOTE. — A NEGOTIABLE PREMIUM NOTE IS ENTITLED TO GRACE like other commercial paper, and a tender of interest on such note within the days of grace will prevent a forfeiture for non-payment of interest at the maturity of the note. *Jarman v. St. Louis Mutual Life Ins. Co.*, Ib.

3. INSANITY. — SUICIDE. — INTEMPERANCE. — Self-destruction renders the policy void. The burden of proof is on the plaintiff to show such kind and degree of insanity as will relieve the act of that consequence. The court instructed the jury, that if they found that the assured had impaired his health by intemperance, then the policy was void; that this was sufficient of itself to defeat a recovery. He agreed that he should not impair his health by intemperance, and if he broke that provision a recovery cannot be had on the policy. If the mental condition, which would otherwise avoid the effect of the self-destruction clause, was produced by intemperance, the plaintiff cannot recover. Insanity induced by violation of one condition of the policy cannot be set up as an excuse for the violation of another condition. *Jarvis v. Conn. Mutual Life Ins. Co.*, C. C. U. S. N. D. Ill., and *John Hancock Mutual Life Ins. Co. v. Moore*, S. C. Mich., Ib.

4. WHEN PREMISES ARE TO BE REGARDED AS VACATED. — FAILURE TO GIVE NOTICE. — "MISTAKE." — The defendant, a joint stock insurance company, issued a policy insuring the plaintiff against loss or damage by fire to the amount of \$600, on his house, shed, and barn. The policy contained a condition that it should be void if the premises should become vacated, by the removal of the owner or occupant, without immediate notice to the company and consent indorsed on the policy. The buildings were occupied by a tenant at the date of the policy, and continued to be

thus occupied until July, 1871, when he left and went to Laconia, his family leaving a short time before he did. He settled for the rent until the following May. He had but little furniture, a portion of which he took away, and a portion was left in the house. When he left, it was his intention to return the next spring, or if business should be dull at Laconia, to return earlier. The buildings were destroyed by fire October 30, 1871. He did not, before the fire, decide to return at any definite time. No person lived in the buildings after he left. Neither the plaintiff nor the defendants had any notice that the tenant had left the premises until after the fire. The referee to whom the action was sent found, as a matter of fact, that the premises at the time of the fire were vacated, within the meaning of the policy; but submitted to the court whether the question, whether the buildings were vacated, properly arises as a question of law upon the foregoing facts. *Held*, that upon such facts appearing, the buildings must be considered as vacated. *Held*, also, that the failure to give notice was not a "mistake" within the intentment of the statute, which provides that "no policy shall be avoided by reason of any mistake or misrepresentation, unless it appears to have been intentionally and fraudulently made; but the party insuring, in any action brought against them on such policy, may show the facts, and the jury shall reduce the amount for which such party would otherwise be liable as much in proportion as the premium ought to have been increased if no mistake or misrepresentation had occurred." *Chamberlain v. Insurance Company*, 55 N. H. 249, on this point overruled. *Sleeper v. N. H. Fire Ins. Co.*, S. C. N. H., *Ib.*

5. LIMITATION OF ACTION ON POLICY. — PLEADING AND PRACTICE. — A policy of insurance contained a provision that no suit or action should be brought thereon unless "commenced" within twelve months next after the loss. A loss having occurred, the assured, within the time limited, filed his petition against the company in due form of law, and caused a summons to be issued and served in due time upon the company. But by mistake the name of another company instead of that of the defendant was inserted in the body of the summons, although the indorsement and entitling of the summons were correct, and in conformity with the petition. After service of this defective summons upon the defendant, and after the expiration of the twelve months limited for bringing the action, the company voluntarily appeared in court and moved to strike the plaintiff's petition from the files, but made no motion to quash the writ or return. The plaintiff then, on leave of the court, amended the writ, so as to make it conform to the petition. *Held*, that the amendment was authorized by the Code, and had the effect to make the action one brought within twelve months after the happening of the loss, within the meaning of the policy. *Burton v. Buckeye Ins. Co.*, S. C. Ohio, *Ib.*

#### INTEREST.

See COMMON CARRIER, 3.

#### JUDGMENT.

See GARNISHMENT.

## JURISDICTION.

**SUPERSEDEAS BOND IN U. S. COURTS.** — Where suit was commenced in the circuit court of the United States, judgment entered against the defendants, and a writ of error had been sued out to the supreme court of the United States and a supersedeas bond given, and the writ of error dismissed: *Held*, that a suit could be maintained in the circuit court of the United States, where the original suit was commenced, on the supersedeas bond, independent of the citizenship of the parties. *Seymour v. P. & C. Construction Co.*, C. C. U. S. No. D. Ill., Chicago L. N., July 8, 1876.

## LIBEL.

1. **SECONDARY EVIDENCE.** — On the trial of an action for libel, it appeared that the original writing, the publication of which was the foundation of the suit, was among the records of the navy department at Washington. *Held*, that secondary evidence of its existence and contents was properly admitted. *Carpenter v. Bailey*, S. C. N. H., Cent. L. J., August 4, 1876.

2. The alleged libel contained charges against the plaintiff as postmaster in the naval service of the United States stationed at Portsmouth, and requested his removal. *Held*, that a letter from Vice-Admiral Porter, while in charge of the department, to the plaintiff, making the removal and stating the reasons for it, was admissible as an act of the department. The plaintiff was permitted to testify that he sold his furniture at a loss, upon his transfer from the naval station at Portsmouth. *Held*, no cause for setting aside the verdict in his favor. *Ib.*

3. **PLEA OF JUSTIFICATION.** — The allegations of a special plea of justification in such a case must be proved substantially as laid. Hence, where such plea sets up a specific fact going to show that the charges were true, and other facts showing that the occasion was lawful and the end justifiable, and alleged that such was the fact: *Held*, that the court properly refused to charge the jury that if the alleged charges are true the plaintiff cannot recover; also, that the jury were properly instructed, among other things, that, if the occasion was lawful and the alleged libel true, the verdict should be for the defendant. *Ib.*

4. **PRIVILEGED COMMUNICATION.** — Whether an alleged libel is a privileged communication is a question for the jury, under proper instructions from the court. *Ib.*

See CONTEMPT.

## MANDAMUS.

**BOARD OF TRADE. — VOLUNTARY ASSOCIATION. — RE-SEATING EXPELLED MEMBER.** — A court has no power to re-seat an expelled member of a board of trade by mandamus. *People v. Board of Trade of Chicago*,<sup>1</sup> S. C. Ill., Chicago L. N., July 15, 1876.

<sup>1</sup> WALKER, J., delivering the opinion of the court, writes: —

"No question has been raised whether the court below had jurisdiction to entertain the

application for, and to award the writ of mandamus. Has relator such an interest or legal right to a membership in the board as will be regarded by a court of justice? It is true



## MORTGAGE.

1. **RELEASE BY MISTAKE. — EFFECT OF RECORDING RELEASE. — ESCROW.** — Where a release of a mortgage was made by the mortgagee, and left in escrow with a third person, and before the performance of the conditions under which the release was deposited, and without any delivery to the mortgagor, the release, by mistake or accident, was filed for record, and was recorded; *held*, that judgment creditors acquire no rights or advantage by such recording, and that an injunction will lie to restrain such creditors from selling under the levy of an execution anything more than the equity of redemption of the mortgagor. The recording of the release, under such circumstances, constitutes a cloud upon the title of the mortgagee, which a court of equity will remove. The mortgagee, by making such a release and placing it in escrow with an agent, by whom it was placed on record by mistake, is not estopped to deny that it is his deed; especially so, where judgment creditors only of the mortgagor seek to take advantage of the record of the release, or they advance no money, give no credit, or do any act by which they change their attitude to the case. *Stanley v. Valentine*, S. C. Ill., Chicago L. N., July 22, 1876.

2. **MORTGAGES, A SPECIES OF INDEBTEDNESS.** — The Constitution of Pennsylvania provides that "the stock and indebtedness of corporations shall not be increased" except as specified by law. A state bank made a mortgage of its property, but failed to comply with the provision of the Constitution or the act of assembly in reference thereto. *Held*, that the mortgage was an "indebtedness," and, therefore, void. *Jeffries v. Lewis*, Ct. Com. Pl. Phil., Leg. Int., July 21, 1876.

that the body is organized under a statutory charter, and so are churches, Masonic bodies and Odd Fellows, and temperance lodges; but we presume no one would imagine that a court would take cognizance of a case arising in either of those organizations, to compel them to restore to membership a person suspended or expelled from the privileges of the organization. They being organized by voluntary association, and not for the transaction of business, but for the purpose of inculcating their precepts and trusts; not for pecuniary gain but for the advancement of morals and for the improvement of their members, they are left to adopt their constitutions, by-laws, and regulations for admitting, suspending, or expelling their members. This organization is not maintained for the transaction of business, or for pecuniary gain, but simply to promulgate and enforce among its members correct and high moral principles in the transaction of business. It is not engaged in business, but only prescribes rules for the transaction of business. In the organization of churches and the other bodies referred to, each person on becoming a member, expressly or by implication, pledges himself to stand to and abide by all rules, edicts, and regulations adopted by the organization. And it

appears that all persons becoming members of the board of trade do the same thing. And the body has the right to make, ordain, and establish by-laws, rules, and regulations for the government of the body and its members in their connection with it. It may be that when a corporation is created for the purpose of pursuing some pecuniary business for the acquisition of profits and gains for its members as stockholders, and a member is deprived of a right or privilege conferred by their charter, that a court would, by mandamus, compel the body to admit such member to the exercise of his rights. In that case, a member or shareholder has such a pecuniary interest as might enable him to be protected or be admitted to the exercise of such rights by legal process. But courts never interfere to control the enforcement of the by-laws of merely voluntary associations, created for the advancement of religious, moral, and social principles, or merely for amusement. In such organizations they must be left to enforce their rules and regulations by such means as they may adopt for their government. The board of trade, so far as we can see, is only a voluntary organization, which their charter fully empowers them to govern in such mode as they may deem most desirable and proper." EDITOR.

## MUNICIPAL CORPORATION.

A DONATION BY A MUNICIPAL CORPORATION IN AID OF A RAILROAD is a public purpose under the Constitution of New Hampshire. *Perry v. City of Keene*, S. C. N. H., Am. Law Reg., July, 1876.

## NEGLIGENCE.

See COMMON CARRIER ; INJUNCTION.

## NUISANCE.

A BLACKSMITH SHOP is not a nuisance *per se*. S. C. Ill., Mo. West. Jur., August, 1876.

## PARTNERSHIP.

See EQUITY ; EXEMPTIONS.

## NOTES OF NEW BOOKS.

THE PHILOSOPHY OF LAW, by Herbert Broom, LL. D. San Francisco: Sumner, Whitney & Co.; New York: Hurd & Houghton. The title of this little volume imports its character. It is not, however, a speculative work: but rather a statement of generalizations touching the leading topics of the Common Law. It will be read with pleasure and profit by old and young lawyers alike. Its admirable typography and dress enhance its more substantial merits.

CHANNEY'S MICHIGAN DIGEST, which covers the Michigan Reports from volume 22 to 33 inclusive, has been issued. It is in some respects exceptionally well done. The Tables of Cases and Index will not fail to be appreciated. Published by the editor, Henry A. Chaney, Detroit.

THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI. A Series of Sketches by Jos. G. Baldwin. San Francisco: Sumner, Whitney & Co.

# THE AMERICAN LAW TIMES.

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## DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

### ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & Co.  
Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.  
Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & Co.  
Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH  
Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.  
Daily Reg. — *Daily Register*, New York, 308 Broadway.  
Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.  
Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.  
La. L. J. — *Louisiana Law Journal*, New Orleans, La.  
Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.  
Leg. Gaz. — *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.  
Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.  
Mo. West. Jur. — *Monthly Western Jurist*, Bloomington, Ill., T. F. TIPTON.  
N. B. R. — *National Bankruptcy Register*, New York, CAMPBELL & Co.  
Pac. Law. Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.  
Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.  
W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.  
West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & Co.

### ACT OF GOD.

See COMMON CARRIER.

### ADMINISTRATOR.

AN ADMINISTRATOR OR EXECUTOR CANNOT SUE HIMSELF, for a debt due him by a decedent. *Perkins v. Perkins*, S. C. R. I., Am. Law Reg., August, 1876.

### BANKRUPTCY.

1. NOTARY PUBLIC. — POWER OF ATTORNEY. — Letters of attorney to represent creditors may be acknowledged before a notary public. General Order No. 34, providing that they may be acknowledged or proved before a register or United States commissioner, was not intended to be exclusive of other methods of proof. *In re Butterfield*, D. C. U. S. E. D. Mich., 14 N. B. R. No. 5.

2. ASSIGNMENT OF OPEN ACCOUNT. — No person by assigning an open

account can substitute another person as creditor without the express consent of the debtor. A consent to an assignment of an open account given after the commission of the act of bankruptcy, but before the filing of the petition against the debtor, does not confer any higher or better rights upon the assignee. *Rollins v. Twitchell*, D. C. U. S. Me., *Ib.*

3. SET-OFF. — A CHOSE IN ACTION WHICH IS NOT NEGOTIABLE, and on which the assignee must sue in the name of the assignor, does not become a mutual debt or credit in the hands of the assignee so as to be a matter of set-off. *Ib.*

4. COMPOSITION. — SECURED CREDITOR. — WORKMEN. — Where the assets are undoubtedly sufficient to pay workmen to the extent of fifty dollars each, they cannot vote on the question whether a resolution of composition shall be adopted or not, except to the extent of their respective debts above fifty dollars. — *In re O'Neil*, D. C. U. S. Mass., *Ib.*

5. AN ADJUDICATION CANNOT BE SET ASIDE on the ground that the proper proportion of creditors did not unite in the petition, unless there was fraud, bad faith, or collusion in obtaining it. *In re Frankenstein*, D. C. U. S. Cal., *Ib.*

6. THE POWER OF THE COURT TO AUTHORIZE A CREDITOR TO WITHDRAW A PROOF that has been filed inadvertently, is wholly discretionary, and will not be exercised merely for the purpose of allowing a creditor to continue an arrest of the bankrupt which was made before the commencement of the proceedings in bankruptcy. *In re Wiener*, D. C. U. S. Mass., *Ib.*

7. THE INDIVIDUAL MEMBERS OF A FIRM ARE NOT ENTITLED TO EXEMPTION FROM THE PARTNERSHIP STOCK. — When a partner took notes belonging to the firm, and with these purchased a homestead three days before the bankruptcy of the firm, and with knowledge of its insolvent condition: *Held*, that he was not entitled to retain the homestead as exempt. *In re Boothroyd*, D. C. U. S. E. D. Mich., *Ib.*

8. A STATE CANNOT TAX the funds in the hands of an assignee. *In re Booth*, opinion by Register BALL, S. D. Ohio, verbally concurred in by the court. *Ib.*

9. IF A CREDITOR IS INDUCED TO VOTE OR SIGN A COMPOSITION BY ANY UNFAIR MEANS, whether known to the debtor or not, his vote so influenced operates as a fraud on the other creditors, and makes the composition voidable by any of them. *In re Sawyer*, D. C. U. S. Mass., *Ib.* No. 6.

10. HUSBAND AND WIFE. — WHERE THE HUSBAND RECEIVES MONEY FROM HIS WIFE and engages in transactions in real estate, in her name, until he accumulates property of considerable value by his skill and energy, the property is liable to his assignee. *Muirhead v. Aldridge*, C. C. U. S. N. J., *Ib.*

11. DEPOSITIONS TO PROVE CLAIMS in bankruptcy are inadmissible unless they contain the averments required by section 5077 of the Revised Statutes of the United States. They must also be made by a party authorized by the statute; and conform substantially to the forms prescribed by the statute and the general orders. *In re Port Huron Dry Dock Co.*, D. C. U. S. E. D. Mich., *Ib.*

12. AGENT. — PROOF OF DEBT may be made by an agent who has had

exclusive charge and control of the same, and knows personally all the facts required to be sworn to in proving it, the creditor himself having no personal knowledge of the facts. *In re Watrous*, D. C. U. S. E. D. Mich., *Ib.*

13. STOCK-NOTE. — LIABILITY OF STOCKHOLDER. — INTEREST. — A stockholder in an insurance company rendered insolvent by a fire, cannot escape his liability on a stock-note by surrendering a certificate of indebtedness on one of the adjusted policies, and withdrawing his note. Such a note constitutes a trust fund for the benefit of the creditors of the company, and the transaction is, in effect, a conversion of the company assets. The stockholder must pay interest from the date of the withdrawal of his stock-note. *Jenkins v. Armour*, C. C. U. S. N. D. Ill., *Ib.*

14. AN ASSIGNMENT BY ONE PARTNER OF HIS INDIVIDUAL ESTATE for the equal benefit of his individual creditors first, and the excess, if any, to be paid to his partnership creditors, falls under section 5129 of the Revised Statutes, and may be set aside at any time within six months. *Barnewell v. Jones*, D. C. U. S. S. D. Ala., *Ib.*

15. OCCUPATION OF LEASED PREMISES BY ASSIGNEE, ETC. — If an assignee continues to occupy the premises leased by the bankrupt, he is liable personally for the rent, and the landlord has a lien on the goods upon the premises, the same as against other tenants. The expenses of the estate cannot be deducted and allowed before the payment of rent that accrued after the commencement of the proceedings in bankruptcy, and while the assignee occupied the premises. When a petition is filed to obtain payment for rent that accrued while the assignee occupied the premises, a jury trial may be allowed. *Buckner v. Jewell*, C. C. U. S. La., *Ib.*

16. MARSHALLING OF ASSETS. — MORTGAGE LOANED TO BANKRUPT. — POLICY OF INSURANCE PAYABLE TO BANKRUPT'S WIFE, ETC. — A creditor who held several judgment notes against a person who was afterwards declared bankrupt, and also several mortgages and two insurance policies as collateral security for their payment, a few days before the filing of the petition in bankruptcy, caused judgment to be entered upon the judgment notes, and executions to be issued thereon. *Held*, that the court had power to so marshal the assets as to require such creditor to foreclose a mortgage before resorting to the general fund. This rule, however, does not extend to a mortgage that was loaned by a third party to the bankrupt, to be used as a security for the payment of the judgment notes. The rights of the assignor of such a mortgage would be superior to those of the assignee in bankruptcy. But the same principle applies to the case of a policy payable to the wife. She is to be regarded as a security to that extent, and entitled to protection in preference to the assignee, as the representative of the general creditors. But the mortgage of the bankrupt and wife, to the petitioner, and the policy of insurance payable to the bankrupt in this case, fall within the general doctrine above stated, on the subject of marshalling securities, and the petitioner to that extent is to be regarded as doubly secured, and should be required to first exhaust his remedy on them, and be allowed, out of the general fund in court, the balance remaining after applying the proceeds of those securities upon his debt. *In re Ganthoff*, D. C. U. S. W. D. Wisc., Chicago L. N., August 12, 1876; Cent. L. J., August 25, 1876.

17. THAT A PART OF THE PROPERTY IS A HOMESTEAD does not change the rule that requires a party, having security on two funds, to first exhaust his remedy upon the fund he was alone secured upon, where there is another party having security on the other alone. *Ib.*

18. AN INSANE PERSON may be adjudged a bankrupt, but cannot commit an act of bankruptcy. *In re Weitzel*, D. C. U. S. W. D. Wisc., Cent. L. J., September 1, 1876.

#### BILLS AND NOTES.

1. NOTE GIVEN FOR PATENT RIGHT. — OMISSION OF WORDS REQUIRED TO BE INSERTED BY STATUTE. — Where a statute directs that any note or bill of exchange, "given for a patent right," shall contain those words in the body thereof, and makes it a misdemeanor for any person to take a note for such consideration without the insertion of those words, the primary object of such statute is to enable the maker to defend for failure of consideration and to give notice to future holders of his right to do so.

Such a statute does not make the note itself illegal and void without those words, nor bring it within the rule that the infliction of a penalty upon an act makes it *per se* illegal and prevents it from being the foundation of a civil action.

Hence, when the maker of a note for such consideration omits to have the words inserted, the failure of consideration is no defence against an innocent holder for value. *Pendar v. Kelley*, S. C. Vt., Am. Law Reg., September, 1876.

2. CONVERSION. — INNOCENT NEGOTIATOR OF STOLEN DRAFT. — Plaintiffs in New York inclosed in a letter a draft directed to W., in England. The draft was stolen out of the letter by a clerk in plaintiffs' office, and was afterwards presented at defendants' bank with a forged indorsement of W. Defendants cashed the draft at the bank on which it was drawn, and placed the proceeds to the credit at defendants' bank of the person who presented the draft. Plaintiffs sued for the proceeds as money received to their use. At the trial evidence was tendered of a custom to send a separate letter of advice when drafts are forwarded from New York, and was rejected, and the verdict was entered for plaintiffs. *Held*, discharging a rule for a new trial, that there was a conversion of the draft by the defendants, that the money was received to plaintiffs' use, that there was no evidence of negligence to estop plaintiffs from setting up their title to the draft as against defendants, and that the evidence rejected was inadmissible. *Arnold v. Cheque Bank*, High Ct. Just. Com. Pl. Div., Albany L. J., Aug. 12, 1876.

3. INDIVIDUAL LIABILITY OF TRUSTEES OF RELIGIOUS SOCIETY. — A note was given, as follows: —

"One year after date, we, the trustees of the Seventh Presbyterian Church, promise to pay to the order of H. G. Powers, six hundred dollars, value received, with interest at six per cent. per annum.

A. H. BRIGGS,	} Trustees."
LOUIS B. KELLEY,	
JOHN CORBETT,	
F. D. MARSHAL,	

*Held*: that the persons whose names were subscribed were personally liable. *Powers v. Briggs*, S. C. Ill., Chicago L. N., August 12, 1876.

See CONSIGNOR AND CONSIGNEE.

#### COMMON CARRIER.

**ACT OF GOD DEFINED.** — A loss occasioned by the act of God is a loss arising from and occasioned by the agency of nature, which cannot be guarded against by the ordinary exertions of human skill and prudence so as to prevent its effect. Plaintiff delivered to defendant in London a mare to be carried from London to Aberdeen, between which places defendant ran steamers as a common carrier. A storm arising during the voyage, the mare was so injured that she died. The jury found that the injury was caused partly by excessive bad weather and partly by the fright and struggling of the mare, and negatived all negligence on the part of the defendant. *Held*, reversing the decision of the common pleas (reported 13 Alb. L. Jour. 177), that upon these findings of the jury the defendant was not liable. *Nugent v. Smith*, S. C. of Judicature Ct. App., Albany L. J., Sept. 2, 1876.

#### COMMON SCHOOL.

**RIGHT OF PARENT TO ELECT STUDIES FOR CHILD. — TRESPASS FOR EXPULSION BY DIRECTORS AND TEACHERS.** — Plaintiff, a female, sixteen years of age, was expelled from a common school for refusing to obtain certain books necessary to the study of book-keeping, one of the studies prescribed by the directors for the class to which plaintiff had been assigned. It was found that her refusal was in obedience to the directions of her parents and was adhered to after due notice of expulsion in the event of further resistance. Judgment was entered for plaintiff and affirmed on appeal. *Ruleson v. Post*,<sup>1</sup> S. S. Ill., Mo. West. Jur., September, 1876.

#### CONSIGNOR AND CONSIGNEE.

**RIGHTS OF CONSIGNEE AS AGAINST CONSIGNOR'S CREDITORS. — REPLEVIN. — BILL OF LADING. — BILLS AND NOTES.** — Where a party consigns goods to another, and draws upon the consignee for funds, accompanying the draft with the delivery of the bill of lading or shipping receipt, as collateral security for its payment, the acceptance and payment by the consignee of the draft, accompanied with the bill of lading or ship-

<sup>1</sup> Judge WALKER, who delivered the opinion, writes as follows:—

"The law for the purpose of preserving the school, and promoting its usefulness, has empowered the directors to suspend or expel scholars, but only for disobedient, refractory, or incorrigibly bad conduct. It is by the commission of one of these acts alone that the pupil can forfeit his right to the privileges of the school. And this forfeiture can only be enforced and the right lost after all other reasonable means have failed. Nor is the suspension or expulsion designed merely as a punishment of the child, but principally as a means of preserving order and the proper government of the school. . . .

"Law-givers in all free countries, and with few exceptions in despotic governments, have deemed it wise to leave the education and nurture of the children of the state, to the direction of the parent or guardian. This is, and has ever been, the spirit of our free institutions. The state has provided the means and brought them within the reach of all, to acquire the benefit of a common-school education, but leaves it to the parents and guardians to determine the extent to which they will render it available to the children under their charge." — EDITOR.

ping receipt, vests in him a special property in the goods, sufficient to maintain replevin against an officer, who, after such delivery, attaches them upon a writ against the general owner. In such case, although the draft is not paid until after the officer has levied on the goods, still, if the draft and shipping receipt were delivered to the payee of the draft before the levy, such delivery will be regarded as made for the use of the consignee, and when he pays the draft, his right to the goods will relate back to the time of the delivery of the draft and shipping receipt to the payee of the draft, and this without reference to whether the payee of the draft paid any consideration therefor to the owner or not, if the consignee paid it in good faith, without notice of any attachment or levy on the goods. *Peters v. Elliot*, S. C. Ill., Cent. L. J., August 25, 1876.

### CONTRACT.

1. REFORMATION OF CONTRACT. — CLEAR AND CONVINCING PROOF IS REQUIRED to warrant the reformation of a written instrument on the ground of mistake, and when it clearly appears that this rule has been disregarded in reforming an instrument, and the finding of the court can be sustained only upon the supposition that it regarded the law as requiring nothing more than a preponderance of evidence to warrant a finding sustaining the alleged mistake, a reviewing court, on error, may reverse the judgment based on such finding. *Potter v. Potter*, S. C. Ohio, Mo. West. Jur., September, 1876.

2. CONTRACT OF SURETYSHIP. — An agreement as follows: "In consideration that Messrs. Griffith, Roberts & Butler, of Utica, N. Y., will sell and deliver to R. C. Pyle, of Easton, Pa., ready made clothing, or other goods, and of one dollar paid to me by said firm, I hereby agree to become security for the payment of any balance not to exceed five thousand dollars of all goods sold and delivered to said Pyle during one year from date, goods to be sold on credit of six months.

"Dated Easton, Pa., September 1, 1873.

(Signed)

"THEODORE R. SITGREAVES;"

is a contract of suretyship and not a guaranty. *Sitgreaves v. Griffith*, S. C. Pa., Leg. Int., Aug. 4, 1876.

### CORPORATION.

1. PURCHASE BY CORPORATION OF ITS OWN STOCK. — MERGER. — ACTION AT MEETING OF DIRECTORS NOT REGULARLY CALLED. — LACHES OF STOCKHOLDER, ETC. — The fact of merger depends largely on intention, and this rule applies to a case where a corporation purchases shares of its own stock. The purchase suspends the right to vote on the shares, and may be a merger if so intended; but if not so intended, it is not a merger, and the presumption is that the corporation does not intend a merger, but to hold the stock as assets or to sell and reissue it.

A quorum of the directors of a corporation are competent to act within the scope of their powers and to bind the corporation, although the meeting was not regularly called and there was no notice to the other directors.

A sale of the company's shares of its own stock, made at such a meeting of the directors, if made *bonâ fide* and for full value, and for the pur-



pose of raising money to meet an urgent necessity of the company, passed a good *prima facie* title to the shares, and could only be set aside for cause, upon a direct proceeding for that purpose. Any director or stockholder desiring to avoid such sale must proceed at once to dispute it in legal form; acquiescence until the consideration has been appropriated to the benefit of the corporation is a ratification of the sale. If the sale is otherwise valid, it is not vitiated by the fact that the motive of the purchaser and of some of the directors was to enable the former to vote upon the shares in a certain manner at an approaching election of corporate officers. *State v. Smith*, S. C. Vt., Am. Law Reg., August, 1876.

2. WHERE NEW STOCK IS ISSUED WHICH IS TO SHARE IN PROFITS WITH EXISTING STOCK, all the holders of the latter have an equal right to subscribe for their proportionate part of the new stock, but this rule does not apply to original stock bought in by the corporation and held as assets, and sold for the payment of liabilities or for the general benefit. *Ib.*

See BANKRUPTCY, 18.

CREDITORS, RIGHTS OF.

See FRAUDULENT ASSIGNMENT.

#### CRIMINAL LAW.

1. POWER OF JUDGE TO SUSPEND OR OMIT SENTENCE. — SUBSEQUENT SENTENCE BY DIFFERENT JUDGE. — A judge has power to suspend sentence, where the circumstances, in his opinion, render the offence trifling, and the law has imposed no minimum punishment for it. In general, where a sentence has been omitted by the judge who tried the case, another judge may impose the proper sentence at a subsequent time. But where sentence has been suspended by a judge under circumstances that indicate his opinion that no punishment should be inflicted, as, *e. g.*, where he has discharged the prisoner on his own recognizance in a nominal amount, a subsequent sentence by a different judge is erroneous and will be reversed. *Weaver v. The People*, S. C. Mich., Am. Law Reg., September, 1876; Mo. West. Jur., September, 1876.

2. HOMICIDE. — "HUMAN BEING" AS APPLIED TO INFANT ALLEGED NOT TO HAVE BEEN BORN. — The defendant, a physician, was employed to attend a woman in childbirth. The child died and the defendant is charged with murder for having produced its death. The court refused to instruct the jury as follows: "To constitute a human being in the view of the law, the child mentioned in the indictment must have been fully born, and born alive, having an independent circulation and existence separate from the mother, but it is immaterial whether the umbilical cord which connects it with the mother be severed or not." *Held*, error.

In such case the court gave the following instruction: "If the child is fully delivered from the body of the mother, while the after-birth is not, and the two are connected by the umbilical cord, and the child has an independent life, *no matter whether it has breathed or not, or an independent circulation has been established or not*, it is a human being, on which the crime of murder may be perpetrated." *Held*, error. *State v. Win-*

*throp*, S. C. Iowa, West. Jur., August, 1876; Cent. L. J., August 25, 1876.

See HABEAS CORPUS.

DAMAGES.

See LIBEL; MASTER AND SERVANT, 2.

DIVORCE.

INSANITY AFTER MARRIAGE. — IMPOTENCY AND CRUEL CONDUCT RESULTING FROM SUCH INSANITY. — Insanity of the wife occurring after marriage, even though it be of a permanent nature, is not cause for divorce. Nor is impotency or cruel conduct during such insanity. *Wertz v. Wertz*, S. C. Iowa, West. Jur., August, 1876; Cent. L. J., August 18, 1876.

EASEMENT.

LIGHT AND AIR. — SWINGING OF WINDOW-SHUTTERS OVER ADJOINING LAND. — FIRE-ESCAPE. — NOTICE OF EASEMENT. — SEVERANCE BY MORTGAGE. — Where a common owner of two tenements, the windows of one of which overlook the yard of the other, and receive light and air therefrom, its shutters swing out over such yard, and access from its fire-escapes which overhang the yard being had to such yard, severs the same by conveyances to different persons, an easement in favor of the tenement so overlooking the other, it being the one first conveyed, is created in respect to light and air, the swinging of the shutters, and access to and from the fire-escapes. Such easement is an apparent one. The grantee of the servient tenement, the one later conveyed, is deemed to have actual notice of such easement, and takes his title subject thereto. In such case it is immaterial whether such severance be by deed or mortgage, inasmuch as by foreclosure the mortgage is ripened into a deed. *Havens v. Klein*, Ct. Com. Pl. N. Y. City, Am. Law Reg., August, 1876.

EVIDENCE.

1. THE RULE WHERE FRAUD ALLEGED AMOUNTS TO AN INDICTABLE OFFENCE. — On the trial of a civil action, wherein the claim or defence is based on an alleged fraud, the issue may be determined in accordance with the preponderance or weight of evidence, whether the facts constituting the alleged fraud do, or do not, amount to an indictable offence. *Stranathan v. Greaves*, S. C. Ohio, Am. Law Reg., September, 1876.

2. EXPERT TESTIMONY. — WHEN INADMISSIBLE. — The opinions of witnesses should not be received as evidence, where all the facts upon which such opinions are founded can be ascertained, and made intelligible to the court or jury. On questions of science, skill, or trade, where the facts in issue are not themselves accessible by evidence, persons of skill, called experts, are, from the necessity of the case, permitted to give their opinions in evidence. Whether glass, placed in a sidewalk to afford light to the area below, is unsafe, by reason of the too great smoothness or slipperiness of its surface, is not a question of science or skill such as

to render the opinion of witnesses admissible. *City of Chicago v. McGiven*, S. C. Ill., Cent. L. J., September 1, 1876.

3. ENTRIES AGAINST INTEREST. — ENTRY OF PAYMENT OF INTEREST. — The rule as to the admissibility in evidence of entries against interest made by a dead man, embraces entries which *prima facie* were against his interest at the time when they were made, and the purpose to which the evidence is capable of being applied is immaterial. An entry of a payment of interest made to the dead man is *prima facie* against his interest within the meaning of the rule. *Taylor v. Witham*, Eng. High. Ct. Ch. Div., Cent. L. J., August 18, 1876.

4. SECONDARY EVIDENCE. — CALLING DEFENDANT. — A subscribing witness testified that when he signed as a witness to a judgment note for purchase money the wife had not signed it. *Held*, that plaintiff was not obliged to call defendant as a witness, and as few persons were acquainted with her signature, evidence could be received of her statement that she had signed a paper. *Cook v. Gable*, S. C. Pa., Leg. Int., July 28, 1876.

5. EVIDENCE OF SUPPOSED FACTS. — The dead body of a man was found under a bridge, whose abutments were not properly guarded by barriers, and whose maintenance and repair the city was charged with. *Held*, that general evidence as to the supposed cause of the death was properly admitted in an action against the city. *City of Scranton v. Dean*, S. C. Pa., Leg. Int., August 4, 1876.

6. EVIDENCE THAT PLAINTIFF HAD KNOWLEDGE OF FACTS MATERIAL TO THE ISSUE. — Plaintiff sued the township for the loss of his mare, caused by the unsafe condition of the road over which she was being driven and recovered damages for the same. *Held*, that evidence should have been admitted to prove that he had been notified of the road, and that he could have taken another route without inconvenience. *Township of Forks v. King*, S. C. Pa., Leg. Int., August 18, 1876.

See CONTRACT, 1.

#### EXEMPTIONS.

THE MEMBERS OF AN INSOLVENT FIRM ARE NOT ENTITLED TO the statutory exemptions out of the partnership property, after it has been seized in execution by partnership creditors, notwithstanding all the members join in demanding the exemptions. *Gaylord v. Imhoff*,<sup>1</sup> S. C. Ohio, Am. Law. Reg., August, 1876.

#### FRAUDULENT ASSIGNMENT.

RIGHTS OF CREDITORS OF GRANTOR AND GRANTEE. — The creditors of a fraudulent grantor have no equity as against the innocent creditors of the fraudulent grantee, which entitles them to priority of satisfaction out of personal property fraudulently conveyed, where such creditors of the

<sup>1</sup> The section of the Ohio statute under which the question arose is as follows: "That it shall be lawful for any resident of Ohio, being the head of a family and not the owner of a homestead, to hold exempt from levy and sale as aforesaid, personal property to be selected by such person, his agent or attorney, at any time

before sale, not exceeding five hundred dollars in value in addition to the amount of chattel property now by law exempted. The value of said property to be estimated and appraised by two disinterested householders of the county, to be selected by the officer." 66 Ohio Laws, 50. — EDITOR.

grantee have obtained the first lien. *Parker v. Freeman*, Ch. Ct. Tenn., Cent. L. J., August 11, 1876.

#### HABEAS CORPUS.

POWER OF UNITED STATES COURTS WHERE PRISONER IS IN CHARGE OF STATE OFFICER.—FRAUDULENT WRIT OF UNITED STATES COURT NOT A JUSTIFICATION FOR VIOLATION OF STATE LAW.—The United States courts have power under the writ of *habeas corpus* to discharge persons from the custody of state officers, where it appears that they are held under a state law which seeks to punish them for executing a law of the United States, or where the act for which they are held was done in pursuance of the process of a federal court. But where a party is in custody of a state officer under an indictment for larceny and sets up as a justification for the act complained of a writ of replevin issued from a United States court, the latter court will, on *habeas corpus*, inquire into the fact whether its writ was fraudulently obtained for the purpose of carrying off the property, and if satisfied of that fact, will remand the relator to the custody of the state officer. A writ regular on its face is a justification to the officer to whom it is addressed for everything that he may lawfully do under such an authority, but this rule does not extend to a party who has procured the writ by fraud. *Ex parte Thompson*, D. C. U. S. W. D. Tenn., Am. Law Reg., September, 1876.

#### HOMESTEAD.

See BANKRUPTCY, 17.

#### HUMAN BEING.

See CRIMINAL LAW, 2.

#### HUSBAND AND WIFE.

See BANKRUPTCY, 10.

#### INSANITY.

See BANKRUPTCY, 18; DIVORCE.

#### LANDLORD AND TENANT.

See BANKRUPTCY, 15.

#### LIBEL.

1. INTENT.—DAMAGES.—WHEN LIBELLOUS ARTICLES ARE PUBLISHED, THE LAW PRESUMES MALICE, and the plaintiff is entitled to recover compensatory damages, regardless of the intent that actuated the publisher. The motives of the publisher and the absence of malice in fact, may be shown in mitigation of exemplary damages, but not to weigh against compensatory damages. *Rearick v. Wilcox*, S. C. Ill., Mo. West. Jur., September, 1876.

2. WORDS SPOKEN BY WITNESS CALLED AS AN EXPERT.—Where a witness, called as an expert, being in cross-examination asked if he remembered comments made by a learned judge on his evidence in a previous

case in which he gave evidence as an expert, voluntarily added to his answer a statement in defence of his evidence in the previous case, in words which were defamatory of another person: *Held*, that he was entitled to explain his answer for his own protection, and therefore the words were spoken by him as a witness, and were privileged. *Seaman v. Netherclift*, Eng. High Ct. Com. Pl. Div., Cent. L. J., Aug. 25, 1876.

#### LIMITATIONS.

WHERE A TITLE DESCENDS OR ACCRUES TO A MARRIED WOMAN, she has not a mere reversionary interest in the land consequent upon her husband's death, and a disability as to such estate, till that event. During coverture, the husband is not a tenant by the curtesy, but is only seised in the right of the wife. Their seisin is joint, and the statute of limitations will begin to run against her from the joint disseisin of both. And if she fails to sue within twenty-four years after such disseisin, her right of action is barred. The fact that the husband has the power during coverture to create a particular estate, either *jure mariti*, or as tenant by the curtesy initiate, without his wife's joinder, and thus terminate her estate, has not, under the above statute, the effect of making her interest merely reversionary. *Valle v. Obenhause*, S. C. Mo., Cent. L. J., August 25, 1876.

#### MARRIED WOMAN.

See HUSBAND AND WIFE; LIMITATIONS; MECHANIC'S LIEN.

#### MASTER AND SERVANT.

1. CONDUCT OF SERVANT AS GROUND FOR DISCHARGE. — Where a party is employed by another, he must, in his intercourse with his employer, and those having control of his business, and with those doing business with such employer, abstain from all vulgarity and obscenity of language and conduct, and must be respectful and obedient to all reasonable commands of his employer, and those having control of his business. A failure in any of these requirements by a salesman in a store, would be ground for discharging him before his term of employment expires. *Hamlin v. Race*, S. C. Ill., Cent. L. J., September 1, 1876.

2. CONTRACT. — SUIT BROUGHT BEFORE EXPIRATION OF TERM OF SERVICE. — DAMAGES. — Where a plaintiff had been employed by the defendant for one year, at a specified salary, payable in monthly instalments, and before the year expired he was discharged, and afterwards, and before the end of his term, he brought suit, claiming that the contract was still in force, and that he was, and had been, ready and willing to perform, it was *held*, that he could only recover for the instalments that had matured at the time the suit was brought, notwithstanding the term had expired before the cause was tried. If, when he was discharged, he had terminated the agreement, and sued on the breach of the contract, and the cause was not tried until the term had expired, and it had then appeared that he had been unable to procure employment during the time, it may be that he could have recovered for all the damage he had sustained during the term by the breach of the contract. *Ib.*

## MECHANIC'S LIEN.

A MECHANIC'S LIEN TO BIND A MARRIED WOMAN'S ESTATE, MUST BE FILED AGAINST her *and* her husband, and indicate that the person joined with her is her husband, and that the work and material were done and furnished for and about the improvement of her separate estate. *Schreiffer v. Saum*, S. C. Pa., Leg. Int., August 4, 1876.

## MORTGAGE.

See BANKRUPTCY, 16; EASEMENT.

## MUNICIPAL BONDS.

CONSTITUTIONAL LAW. — SPECIAL LEGISLATION. — The Legislature of Nebraska of 1875, passed an act "authorizing the county commissioners of Jefferson County to provide funds for the payment of certain outstanding warrants of said county," by issuing bonds, selling the same, and using the proceeds in payment of warrants issued to contractors for the erection of a court-house and jail: *Held*, that the commissioners having express authority under the statutes then in force to contract for the erection of said buildings, and the county being justly indebted therefor, the legislature had full constitutional power to pass the act in question. *Commissioners of Jefferson Co. v. The People*, S. C. Neb., West. Jur., September, 1876.

## MUNICIPAL CORPORATION.

THE LIABILITY OF A CITY GROWING OUT OF ITS OBLIGATION TO PROVIDE SUITABLE SIDEWALKS, cannot be extended to include an accident resulting from a sidewalk being slippery by reason of ice or snow that had not accumulated to such an extent as to amount to an obstruction. A city is not required to have its sidewalks so constructed as to secure immunity from danger in using them; nor is it bound to employ the utmost care and exertion to that end. Its duty, under the law, is only to see that its sidewalks are reasonably safe for persons exercising ordinary care and caution. *City of Chicago v. McGiven*, S. C. Ill., Cent. L. J., September 1, 1876.

## NATIONAL BANK.

POWER TO TAKE MORTGAGES AS SECURITY LIMITED to the cases specified in the National Bank Act. *Matthews v. Skinker*, S. C. Mo., Am. Law, Reg., August, 1876.

## NEGLIGENCE.

See MUNICIPAL CORPORATION; RAILROAD.

## NOTARY PUBLIC.

THE REQUISITES OF A NOTARIAL SEAL are determined by the law of the locality from which the official derives his authority. An official seal

is an impression on the paper directly, or on wax or wafer attached thereto, made by the official, as and for his seal. In the absence of express legislation, an official seal need not contain the name of the official. It is the seal, and not its composition or character of words and devices, which raises the presumption of official character of which the courts take judicial notice. The presumption is, that a seal is the official seal of the person it purports to be, and who subscribed the jurat. Any impression made upon sealing-wax or wafer adhering to the paper, without any device or words indicative of the particular official, is entitled to judicial sanction as evidence of the official character of the individual who signs the jurat. *In re Phillips*, D. C. U. S. W. D. Mich., 14 N. B. R. No. 5.

See BANKRUPTCY, 1.

#### PARTNERSHIP.

See BANKRUPTCY, 7; EXEMPTIONS.

#### PAYMENT.

**PAYMENT OF EXECUTION BY SHERIFF.** — Where a sheriff, who, by his negligent delay in collecting an execution, had rendered himself liable to the plaintiff, paid off the debt in his own exoneration and took an assignment from the plaintiff to a third person in trust for himself: *Held*, that the debt was not thereby extinguished, and the assignee was entitled to an *alias* execution thereupon. *Heilig v. Lemby*, S. C. No. Ca., Cent. L. J., July 21, 1876.

#### PRIZE.

**THE REBEL CRUISER FLORIDA**, while anchored in the neutral port of Bahia, was captured by a war vessel of the United States, and brought into Hampton Roads, by a prize-crew where she was accidentally sunk; Brazil demanded and received satisfaction from the United States for this violation of her neutrality; and this circumstance, in connection with the illegality of the seizure, was held to conclude the rights of the captors, and that she could not be condemned as prize. *Collins v. Steamer Florida*, S. C. D. C., W. L. R., July 22, 1876.

#### RAILROAD.

**LIABILITY FOR DEFECTIVE CONSTRUCTION OF TRACK.** — **NEGLIGENCE.** — In the construction of its track a railroad company is bound to provide, not only for the passage of the volume of water that may be expected to flow through a particular water-way, but also the passage for such a torrent as might accumulate there from the occurrence in the vicinity of one of the exceptionally violent storms to which the country is occasionally subject, although no reason existed to expect such a storm would ever happen at that particular place. But neglect to provide against such an exceptional outburst is not such negligence as will justify unitive damages. *Kansas Pac. R. R. Co. v. London*, S. C. Col., Cent. L. J., June 30, 1876.

## REPLEVIN.

See CONSIGNOR AND CONSIGNEE.

## SEAL.

See NOTARY PUBLIC.

## SET-OFF.

EFFECT OF PLEA. — A plea of set-off is an admission of the justice of plaintiff's demand, and precludes the introduction of evidence to invalidate it. *Raymond v. Kerker*, S. C. Ill., Mo. West. Jur., August, 1876.

See BANKRUPTCY, 3.

## SPECIAL LEGISLATION.

See MUNICIPAL BONDS.

## STOCKHOLDER.

See BANKRUPTCY 13; CORPORATION.

## TELEGRAPHIC MESSAGE.

FAILURE TO TRANSMIT MESSAGE IN CIPHER. — The plaintiffs sent to the defendant, who was a collector and transmitter of telegraphic messages, a telegram for transmission to America. It was in cipher unintelligible to the defendant. The defendant negligently delayed sending it, whereby the plaintiffs lost an order upon which they would have earned a considerable commission. *Held*, that they were entitled to nominal damages only. — *Sanders v. Stewart*, Eng. High Ct. Com. Pl. Div., Cent. L. J., September 1, 1876.

## WILL.

DEVISE WITH SECRET TRUST. — MORTMAIN ACT. — LIMITATIONS. — A testator, being ill, sent for a scrivener to draw a will, dividing his property among certain charities; upon being informed that it would be avoided by his death within thirty days, but that by bequeathing it absolutely to a man whom he could trust, the same result might be attained, he executed a will giving all his estate to Y., who, he was confident, would execute his wishes, but who had no knowledge of the will or its contents until after his death, which occurred within thirty days. Y. admitted, on examination, that he felt a moral obligation to devote the property to the charities which a witness present at the execution of the will informed him were those meant by the testator. *Held*, that the bequest to Y. was good, and not within the provisions of the Mortmain Act of Pennsylvania, of 26th April, 1855. *Schultz's Appeal*, S. C. Pa., Am. Law Reg., August, 1876.



## SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1875.]

JURISDICTION. — FEDERAL QUESTION. — WAR.

NEW YORK LIFE INS. CO. v. HENDREN.

Whether or not a contract was extinguished by war, does not involve a federal question.

WAITE, C. J. This record does not show that any federal question was decided or necessarily involved in the judgment rendered by the court below. The pleadings, as well as the instructions asked and refused, present questions of general law alone. The court was asked to decide as to the effect, under the general public law, of a state of sectional civil war upon the contract of life insurance, which was the subject of the action. It was not contended, so far as we can discover, that the general laws of war, as recognized by the law of nations, applicable to this case, were in any respect modified or suspended by the Constitution, laws, treaties, or executive proclamations of the United States. This distinguishes the present case from that of *Matthews v. McStea*, 20 Wall. 640, of which we took jurisdiction, and decided at the present term. In that case the question was presented whether the President's proclamation of April 19, 1861, did not suspend, for the time being, the operation of that principle in the law of war which prohibited commercial intercourse in time of war between the adherents of the two contending powers. Here there is nothing of the kind.

Our jurisdiction over the decisions of the state courts is limited. It is not derived from the citizenship of the parties, but the question involved and decided. It must appear in the record or we cannot proceed. We act upon questions actually presented to the court below, not upon such as might have been presented or brought into the case but were not.

The case, therefore, having been presented to the court below for decision upon principles of general law alone, and it nowhere appearing that the Constitution, laws, treaties, or executive proclamations of the United States were necessarily involved in the decision, we have no jurisdiction. We have often so decided. *Bethel v. Demaret*, 10 Wall. 537; *Delmas v. Insurance Co.* 14 Wall. 666; *Tarver v. Keach*, 15 Wall. 67; *Rockhold v. Rockhold*, decided at the present term. The motion to dismiss the writ for want of jurisdiction is granted.

BRADLEY, J., *dissenting*. I dissent from the judgment of the court in this case. When a citizen of the United States claims exemption from the ordinary obligations of a contract by reason of the existence of a war between his government and that of the other parties to it, the claim is made under the laws of the United States, by which trade and intercourse with the enemy are forbidden. It is not by virtue of the state law that such intercourse is forbidden, for a separate state cannot wage war. That is the prerogative of the general government. It is in accordance with

international law, it is true; but international law has the force of law in our courts because it is adopted and used by the United States. It could have no force but for that, and may be modified as the government sees fit. Of course, the government would not attempt to modify it in matters affecting other nations, except by treaty stipulations with them. If it did, it would prepare itself to carry out its resolutions by military force. But in many things that *prima facie* belong to international law, the government will adopt its own regulations; such as the extent to which intercourse shall be prohibited; how far property of enemies shall be confiscated; what shall be deemed contraband, &c. All this only shows that the laws which the citizens of the United States are to obey in regard to intercourse with a nation or people with which they are at war, are laws of the United States. These laws will be the unwritten international law, if nothing be adopted or announced to the contrary; or the express regulations of the government, when it sees fit to make them. But in both cases it is the law of the United States for the time being, whether written or unwritten.

The case, then, of claiming dissolution or extinction of a contract on the ground of the existence of a war, is precisely a case within the meaning of the law which gives a writ of error to this court from the judgment of a state court where a right or immunity is claimed under the Constitution of the United States, or under an authority exercised under the United States. The power given by the Constitution to Congress to declare war, and the authority of the general government in carrying on the same, are the grounds on which the exemption or immunity is claimed. It is under the authority of the government of the United States that the party is not only shielded but prevented from the execution of his contracts. If he performed them it would be a violation of his obligations to his government.

And it is highly expedient that obligations and immunities of this sort, arising from public law and the public relations of the government, should be subject to uniform rules, and to the final adjudication of the judicial department of the general government.

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#### NOTES OF NEW BOOKS.

THE POLITICAL AND CONSTITUTIONAL LAW OF THE UNITED STATES, by Wm. O. Bateman, Esq., is announced to be ready by the publishers, Messrs. G. J. Jones & Co. of St. Louis.

WRONGS AND RIGHTS OF A TRAVELLER, by R. Vashon Rogers, Esq., the fourth volume of Messrs. Sumner, Whitney & Co.'s Series, entitled, "Legal Recreations," has been issued.

MESSRS. H. O. HOUGHTON & Co., Riverside Press, Cambridge; Hurd & Houghton, New York, have in preparation a new work entitled "Civil Malpractice." It is to treat chiefly of surgical jurisprudence, and promises to be useful to both legal and medical practitioners.

AN AMERICAN REPRINT OF BROOM AND HADLEY'S COMMENTARIES on English Law, or Blackstone's Commentaries re-written, has been published by Jno. D. Parsons, Esq., of Albany. The notes are by Wm. Wait, Esq. As a hand-book there can be no doubt of its value.

# THE AMERICAN LAW TIMES.

NEW SERIES. — NOVEMBER, 1876. — VOL. III., No. 11.

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## DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

### ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & Co.  
Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.  
Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & Co.  
Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.  
Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.  
Daily Reg. — *Daily Register*, New York, 303 Broadway.  
Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.  
Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.  
La. L. J. — *Louisiana Law Journal*, New Orleans, La.  
Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.  
Leg. Gaz. — *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.  
Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.  
Mo. West. Jur. — *Monthly Western Jurist*, Bloomington, Ill., T. F. TIPTON.  
N. B. R. — *National Bankruptcy Register*, New York, CAMPBELL & Co.  
Pac. Law. Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.  
Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.  
W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.  
West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & Co.

### ADMIRALTY.

1. COLLISION. — A collision occurring in open sea, and in broad daylight, between two vessels easily seen when miles apart, and whose courses, on the tacks upon which they were sailing, necessarily intersected each other, cannot be attributed to unavoidable accident. *Guderyalen v. The Gifford*, D. C. U. S. E. D. Wisc., Chicago L. N., September 30, 1875.

2. SEVENTEENTH RULE. — The above is a case where the seventeenth rule of the Navigation Act is applicable; that "when two sail vessels are crossing so as to involve risk of collision, then if they have the wind on different sides, the vessel with the wind on the port side shall keep out of the way of the vessel with the wind on the starboard side," neither vessel being free, but both being close-hauled. *Id.*

3. RIGHT TO COURSE. — The vessel on the starboard tack *must* keep her course, in order that she may not mislead or baffle the movements of the vessel on the larboard tack, and she should only change her course when a collision seems otherwise unavoidable. *Id.*

4. **ERROR. — IMPENDING DANGER.** — Where a vessel commits an error under impending danger, or *in extremis*, produced or brought about by another vessel, such error cannot be alleged as a fault by such other vessel. *Ib.*

5. **LIEN OF UNDERWRITER. — AVERMENTS OF LIBEL.** — The underwriter of a ship has a lien for the premiums due upon marine policies, and is entitled to payment from the proceeds of sale.

The libel or petition should aver not only the dates and amounts of the policies, but the names of the parties insured, and the character and extent of their several interests in the vessel. *The Dolphin*, D. C. U. S. E. D. Mich., Chicago L. N., September 9, 1876.

#### ASSESSMENT.

See CORPORATION, 1, 2, 3.

#### BANKRUPTCY.

1. **INJUNCTION IN INVOLUNTARY CASE UNDER SEC. 5024. — HOW LONG IT CONTINUES. — CONTEMPT.** — An injunction issued in an involuntary case, under section 5024 of the Revised Statutes, and restraining a person "in the mean time, and until the hearing and decision on the said petition, and until the further order of the court," from interfering with the property of the debtor, ceases to operate as soon as the debtor is adjudged bankrupt, and a party is not liable for contempt for doing an act prohibited by it after that time. In the absence of an injunction, a party is not liable for a contempt for selling property under a decree of foreclosure entered before the adjudication of bankruptcy, or for entering up a judgment for the deficiency against the bankrupt. *In re Irving*, D. C. U. S. S. D. N. Y., 14 N. B. R. No. 7.

2. **JURISDICTION OF STATE COURT. — THE MERE FILING OF A PETITION IN INVOLUNTARY BANKRUPTCY DOES NOT DIVEST THE JURISDICTION OF A STATE COURT OVER AN ACTION TO FORECLOSE A MORTGAGE.** *Ib.*

3. **SET-OFF.** — A PARTY WHO HOLDS STOCK OF THE BANKRUPT, AS COLLATERAL for a certain debt which was overdue at the commencement of the proceedings in bankruptcy, may, if he has the power to sell the stock, retain the surplus by way of set-off on another claim which he holds against the bankrupt. *In re Dow*, D. C. U. S. Mass., *Ib.*

4. **WHEN ONE PARTNER PLEDGES HIS PROPERTY AS SECURITY FOR A FIRM DEBT, THE CREDITOR MAY PROVE HIS FULL CLAIM AGAINST THE FIRM WITHOUT A VALUATION OF THE SECURITIES.** *Ib.*

5. **GENERAL ASSIGNMENT. — INVALIDITY OF.** — A general assignment for the equal benefit of all creditors is void, as against an assignee in bankruptcy, being at war with the policy of the bankrupt law. The same rule was applicable to the law of 1841. Such has always been the rule under each successive English act, and is now a matter of statutory provision in England. The rule, that where a statute is taken from another country or state which has received a judicial interpretation, the presumption will be that such interpretation is also adopted, held to be applicable in this instance with more than ordinary force. In the laws of 1867, the judicial interpretation which in England held general assignments to be void, as

against a claimant under the bankrupt law, has been expressly adopted, by adding the words, "or to defeat the operation of the act." It was this effect in England which the courts declared avoided such transfers. *Globe Ins. Co. v. Cleveland Ins. Co.*, C. C. U. S. N. D. Ohio, *Ib.*

6. MORTGAGE WITH POWER OF SALE. — HOLDER MAY PURCHASE. — POWER OF ATTORNEY TO EXECUTE DEED NOT AFFECTED BY BANKRUPTCY. — The holder of a mortgage containing a power of sale may become a purchaser at a sale under the power if the mortgage so provides. The power to execute a deed in the mortgagor's name and as his attorney is not affected by his bankruptcy, although the sale, under the power contained in the mortgage, took place after the commencement of the proceedings in bankruptcy. *Hall v. Bliss*, S. C. Mass., *Ib.*

7. DISMISSAL OF SUIT. — SURRENDER. — If the assignee accepts the amount received by a preferred creditor after he has put in his proof, and the creditor has put in considerable proof before the special examiner to whom the action has been referred, and dismisses his suit upon payment of costs, this is a surrender, and the creditor may prove his debt. *In re Riordon*, D. C. U. S. S. D. N. Y., *Ib.*

#### CONSTITUTIONAL LAW.

THE RULE WHERE CLAUSE OF CONSTITUTION IS OPERATIVE WITHOUT LEGISLATION. — TAXATION. — The present Constitution of Missouri, which went into effect November 30, 1875, art. 10, sec. 11, declares that the taxation for school purposes in school districts shall not exceed forty cents on the one hundred dollars, with a proviso that this rate may be increased in districts formed of cities and towns, to an amount not to exceed one dollar on the hundred dollars' valuation, and in other districts to an amount not to exceed sixty-five cents on the hundred dollars' valuation, on the condition that a majority of the voters who are tax-payers, voting at an election held to decide the question, vote for said increase. In the schedule it is declared, that the provisions of all laws which are inconsistent with the Constitution shall cease upon its adoption, except that all laws which are inconsistent with such provisions of the Constitution as require legislation to enforce them shall remain in force until the first day of July, 1877, unless sooner amended or repealed by the general assembly. *Held*, that this provision of the Constitution relating to the rate of taxation required no legislation to enforce it, and therefore on the adoption of the Constitution went into effect. The proviso by which a mode was appointed to alter it, to a certain extent, and which depended on legislative action, does not prevent the restriction from going into effect. *Ex parte St. Joseph Board of Public Works*, S. C. Mo., Cent. L. J., September 8, 1876.

See PUBLIC SCHOOLS.

#### CONSTRUCTION OF STATUTES.

WHERE THERE IS NO WAY OF RECONCILING CONFLICTING CLAUSES OF A STATUTE, and nothing to indicate which the legislature regarded as of paramount importance, force should be given to those which would make the statute in harmony with the other legislation on the same subject, and which would tend most completely to secure the rights of all persons and

parties affected by such legislation. *K. P. R. R. Co. v. Board of Wyandotte*, S. C. Kas., Cent. L. J., September 15, 1876.

#### CORPORATION.

1. **ASSESSMENT. — DISCRETION OF DIRECTORY, ETC.** — The act of incorporation of the plaintiff company provided "that the directors shall, after receiving notice of any loss or damage by fire sustained by any member, and ascertaining the same, or after the rendition of any judgment against said company for such loss or damage, settle and determine the sum to be paid by the several members thereof, as their respective proportions of such loss; . . . and the sum to be paid by each member shall always be in proportion to the original amount of his deposit note or notes," &c. *Held*, that an assessment calling for the exercise of discretion on the part of the directors could only be made by them. Where the power to be executed necessarily involves the exercise of judgment and discretion, it cannot be delegated. *Farmers' Mut. Life Ins. Co. v. Chase*, S. C. N. H., Ins. L. J., September, 1876.

2. **RATIFICATION BY DIRECTORS OF ASSESSMENT.** — At a meeting of a board of directors of the plaintiff company the following vote was passed: "Whereas, the directors of the F. M. F. I. Co. have made assessments to cover all debts, losses and expenses of said company, and added the amount authorized by law thereto, and thereby made all the assessments that they are authorized to make, and considering it for the best interests of the company, and expedition in making collections; therefore, *Resolved*, that the treasurer be authorized to give up the premium notes of any person on demand when said person has paid all assessments and dues to the company." *Held*, that the vote was not a ratification of an assessment made by persons other than the directors. *Ib.*

3. **SUBSCRIPTION TO STOCK. — LIABILITY OF SUBSCRIBER TO ASSESSMENTS.** — The plaintiff company was about being organized, and defendant was asked to take stock in it, and subscribed his name to a paper prepared for that purpose, agreeing to take ten shares. *Held*, that this was an offer made by the company on the one side, and accepted by the defendant on the other, and that a complete contract was formed, which made him liable as a stockholder to assessments.

*Held*, also, that it was not necessary that certain shares designated by numbers should be assigned to defendant, to make him liable. *E. & N. A. Railway Co. v. McLeod*, S. C. N. B., Am. Law Reg., October, 1876.

See EQUITY, 2; FOREIGN LAW, 2.

#### CO-SURETY.

A CO-SURETY WHO HAS PAID AN INDEBTEDNESS may, without the assent of the payee, put the notes in judgment and proceed against his co-surety for his proportion. *Wright v. Grover & Baker*, S. C. Pa., Leg. Int., September 1, 1876.

#### CRIMINAL LAW.

1. **THE BURDEN OF PROOF WHERE INSANITY** is relied on as a defence is on the prosecution. *Wright v. The People*, S. C. Nev., Cent. L. J., September 8, 1876.

2. THE DEGREE OF MENTAL UNSOUNDNESS, in order to exempt a person from punishment, must be such as to create uncontrollable impulse to do the act charged. If it be found insufficient to deprive the accused of ability to distinguish right from wrong, he should be held responsible for the consequences of his acts. *Ib.*

3. CLERICAL ERROR IN INDICTMENT. — An indictment for rape charged that on, &c., "with force and arms one J. W., a male, in and upon Z. T., a female (over the age of ten years), violently and feloniously did make an assault, and her the said Z. T. then and there, violently and by force and arms, against *he* will, did ravish and carnally know," &c. *Held*, that the omission of the letter was not fatal to the indictment, as the words "*against he will*" might be stricken out as surplusage and the remaining averments would leave the indictment sufficient in law. *Williams v. The State*, S. C. Texas, *Ib.*, September 15, 1876.

4. THE WORD "RAVISH" implies force and violence in the man, and want of consent in the woman. *Ib.*

5. INSTRUCTION. — THREATS. — FRAUD. — The indictment charged that the offence was committed "with force and arms." *Held*, that it was error to refuse to instruct the jury that any threats or fraud on the part of the prisoner should not be considered by them. *Ib.*

See INTOXICATING LIQUORS.

DEATH, PRESUMPTION OF.

See INSURANCE, 14.

#### EQUITY.

1. REQUISITES OF BILL. — MUST STATE COMPLAINANT'S CASE FULLY. — In proceedings in equity, whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge, must be alleged positively in the bill. Such convenient degree of certainty must be adopted as will give the defendant full information of the case which he is called upon to answer. *Rice v. Merrimack Hosiery Co.*, S. C. N. H., Am. Law Reg., October, 1876.

2. JURISDICTION TO PROHIBIT AN ISSUE OF ILLEGAL SCRIP is vested in a court of chancery, and may be exercised upon a bill filed by a taxpayer. *Colborn v. City of Chattanooga*, S. C. Tenn., Cent. L. J., September 22, 1876.

#### EVIDENCE.

1. THE ADMISSIONS OF A PARTY OUT OF COURT who has been examined as a witness are admissible as independent evidence. *Kreiter v. Bourberger*, S. C. Pa., Leg. Int., August 25, 1876.

2. NOTES OF TESTIMONY TAKEN IN PREVIOUS SUIT. — Notes of testimony were taken upon the trial of a cause; that being discontinued, a new suit was brought between the same parties, and for the same subject matter. *Held*, that on the death of defendant, and the substitution of his executors as parties defendants, the notes of plaintiff's testimony should be admitted in the second suit. *Patterson v. Patterson*, *Ib.*, September 1, 1876.

## EXTRADITION.

**WHAT DEFENCES MAY BE HEARD.** — On a proceeding for extradition, the judge or magistrate acting in extradition has no authority to hear the prisoner's defence, though in the exercise of his discretion he may hear any evidence which may be tendered to show that the offence is of a political character, or one not comprised in the treaty, or that the accuser is not to be believed on oath, or that the demand for the prisoner's extradition is the result of a conspiracy. *In re Rosenbaum*, Ct. Q. B. Lower Canada, Cent. L. J., September 8, 1876.

## FOREIGN LAW.

1. **HOW CONSTRUED, ETC.** — The laws of a foreign state operate beyond its territorial limits only *ex comitate*. The courts of a state where the laws of such foreign state are sought to be enforced will use a sound discretion as to the extent and mode of that comity. They will not permit their tribunals to be used for the purpose of affording remedies which are denied to parties in the jurisdiction of the state that enacted the law, and which tend to operate with hardship on their own citizens and subjects. *Rice v. Merrimack Hosiery Co.*, S. C. N. H., Am. Law. Reg., October, 1876.

2. **CREDITOR OF FOREIGN CORPORATION SEEKING TO ENFORCE LIABILITY OF RESIDENT STOCKHOLDER REFUSED RELIEF.** — A creditor of a corporation, created under the laws of Ohio, filed a bill to enforce the individual liability of the stockholders of the corporation in New Hampshire. The corporation had no assets in New Hampshire, and none of its stockholders resided there. The bill contained no recital by what remedial process the individual liability of stockholders is enforced in Ohio. *Held*, that comity did not require the courts of New Hampshire, in the exercise of a judicial discretion, to give effect to the statute of Ohio. *Id.*

## INSURANCE.

1. **INSURABLE INTEREST.** — A SON has an insurable interest in the life of his father. *Reserve Mut. Ins. Co. v. Kane*, S. C. Pa., Ins. L. J., September, 1876.

2. **PARTNERSHIP.** — **CONTRIBUTORY INSURANCE, ETC.** — V. insured his stock in the Home Ins. Co.; also in the Merchants' Company. He afterward took in B. as partner, when it was agreed between them that the policies should be transferred to the firm, which was accordingly done, except in the case of the Home, whose agent at the time they sought but were unable to find. Afterward insurance was effected for the firm in the L. L. & G. Company, in which it was agreed that in case of other insurance on the property the insured should be entitled to recover from the company only its *pro rata* share of the loss, and in case of the insured's holding any other policy subject to average this policy should also be so subject. The adjustment, according to the evidence of V., was participated in by the Home, and he accepted from the Hanover, one of the insurers, the amount due also from the Home, assigning thereupon the Home policy to the Hanover. *Held*, that the insurance of the Home was treated by the firm as an insurance upon the firm stock, and the L. L. &



G. Company had a right to regard it as contributory under its policy clause. *L. L. & G. Ins. Co. v. Verdier*, S. C. Mich., Ib.

3. SURRENDER OF POLICY DEFINED. — Defendant was allowed against objection to show that at the time the policy was executed he made a verbal agreement with plaintiff's agent that he might surrender the policy whenever he should see fit, and that upon surrendering the policy the note should be delivered up and no further premiums become due. And under this arrangement he showed that sometime in the year 1874 (but whether any instalment was in arrears then did not appear) "he surrendered his said policy by giving it over to the agent of another insurance company," giving notice thereof to the agent of the plaintiff. *Held*, that the delivery of the policy to the agent of the other company was not a surrender. *Am. Ins. Co. v. Woodruff*, Ib.

4. CONTRACTS OF LIFE INSURANCE NOT ABROGATED BY THE WAR. — Where the premiums had been paid to the local agent upon printed receipts signed by the company in the mode prescribed by directions on the policy, the fact that such receipts were not furnished subsequent to the outbreak of war must, in the absence of any waiver or express instructions about the receipt of premiums in some other way, be regarded as a withdrawal of the agent's authority. Where the company is bound by its contract to keep an agent to receive premiums, a failure to comply will excuse the non-payment of premiums, where communication with the home office was cut off by war. That the insured did not renounce his home in the South for the sake of maintaining communication with the company is not an excuse for avoiding the contract. He had a right to remove from place to place in order to keep within the Confederacy. Under the Virginia Code of 1860, a company of another state can only contract through its resident agent, to whom premiums are to be paid, and may do by such agent what it can do by its officers and agents at home. *N. Y. Life Ins. Co. v. Hendren*, Ct. App. Va., Ib.

5. MORTGAGE. — SUBROGATION. — A mortgage provided that in default of the mortgagor keeping the property insured for the benefit of the mortgagee, the latter might effect insurance and the premiums be charged on the mortgage. The mortgagee insured. The policy provided that the insured should assign an interest in the mortgage equal to the loss paid. The loss was less than the mortgage. The company paid the insured the whole principal and interest due on the mortgage, together with the amount paid for premiums, and took an assignment of the whole. In a foreclosure suit brought by the company for interest in default: *Held*, that the insurance discharged *pro tanto* the debt of the mortgagor, first on interest and afterward on principal. The company was not subrogated to the rights of the mortgagee. *Foster v. Van Reed*, S. C. N. Y., Ib.

6. SUB-AGENT. — CONTRACT WITH GENERAL AGENT. — Where the general agent of a life insurance company is appointed and constituted such for a specified territory, by a written agreement which contains a provision for compensating him by commissions on premiums and renewals of policies, to be procured by him or his sub-agents to be employed by him, and his right to such commissions is dependent upon the conditions and limitations therein expressed, which could not be changed without written authority; the power of such general agent to employ a local

agent, and compensate him out of his commissions, to be received for the business to be done by such local agent, is subject to said conditions and limitations, and such local agent cannot acquire, by his agreement with the general agent, without the assent of the company, any greater rights to his compensation than the general agent had power to confer under such written agreement. *U. S. Life Ins. Co. v. Hessberg*, S. C. Ohio, Ins. L. J., October, 1876.

7. **WAIVER BY SUB-AGENT. — DELIVERY OF POLICY BEFORE PAYMENT OF PREMIUM.** — It was expressly agreed in the application and policy that the insurance should not be considered as in force until the premiums had been actually paid, and that no premium should be considered as paid unless a receipt had been given. The policy also provided that the agent had no power to alter its conditions. The application was procured by a local agent in the employ of the state agent, himself appointed by the general agent, to solicit applications, deliver policies, and collect premiums. The policy was sent by mail to be insured by the local agent, in company with a letter stating that he might forward the premium to him by one S. when he would return the receipt, or he might pay it when he (the agent) "came up next time — no hurry about it." The insured was in good health when the policy arrived, but died suddenly fifteen days afterward without having paid the premium. In the books of the local agent the premium was not marked as paid. *Held*, that the agent was not responsible for the premium; that the delivery was an attempted waiver of the policy condition requiring prepayment, and that the insured must be presumed to have known the terms of his contract, and that the agent had no right to waive them; and therefore in the absence of any evidence showing authority given by the company to its agent to waive the conditions, the attempted waiver must be regarded as ineffectual, and the insured is not entitled to recover. *Davis v. Mass. Life Ins. Co.*, C. C. U. S. Vt., *Ib.*

8. **A PHÆTON DESCRIBED IN THE POLICY AS "CONTAINED IN A FRAME BARN," WAS DESTROYED WHILE REMOVED TO A CARRIAGE SHOP FOR REPAIRS.** *Held*, that while the description in the policy defining the risk is a warranty, and a removal not contemplated by the policy avoids the insurance in case of loss; that the words mean only that it was the place of deposit when not absent for temporary purposes incident to ordinary uses and enjoyment of the property. *McChuer v. Girard Fire, &c. Ins. Co.*, S. C. Iowa, *Ib.*

9. **TERMINATION OF VOYAGE BY ICE. — RIGHT AND DUTIES OF MASTER.** — By the terms of the policy the risk was to terminate at the place and at the time the voyage should be stopped in consequence of ice or the closing of navigation making the voyage impossible, allowing three days for a discharge of cargo. *Held*, that the three days were to date from the actual stoppage of the voyage, and that the master had the right to make every effort to continue the voyage, notwithstanding it was obviously impossible to reach the ultimate destination on account of the ice, and to continue to a proper port of discharge notwithstanding obstructions. *Sherwood v. Mercantile Mutual Ins. Co.*, Ct. App. N. Y., *Ib.*

10. **DEATH WHILE INTOXICATED. — ACCIDENT POLICY.** — An accident policy provided that "no claim shall be made under this policy where the

death or injury may have happened while the insured was, or in consequence of his having been, under the influence of intoxicating drinks." *Held*, that it was sufficient to work a forfeiture if the insured was under the influence of intoxicating drinks when injured or killed; it was not essential that the injury or death should occur in consequence of their use. *Shader v. Railway Pass. Ins. Co.*, Ct. App. N. Y., *Ib.*

11. PAYMENT OF PREMIUM.—PAID-UP POLICY.—The policy provided that on its delivery to the company, properly receipted and cancelled, a paid-up policy would be given provided the last premium due should not have remained unpaid more than thirty days.

The plaintiffs sent the sub-agent, who was not employed by the company, from whom the policy had been received and to whom the premiums were paid, a notice of their desire to secure a paid-up policy, and to deliver, cancel, &c., the policy, with a request to forward the same to the company immediately for its action. The notice was delivered to the agent within about twenty days after the premium was due, and was answered by the company at the expiration of the thirty days, stating that the plaintiffs would perceive from their policy what was necessary to do, and when; whereupon a formal discharge of the policy was executed and delivered to the general agent, at the same time expressing a willingness to do whatever was necessary, and requesting a paid-up policy. *Held*, that the plaintiff was entitled to a paid-up policy. *Morrison v. Am. Pop. Life Ins. Co.*, C. C. U. S. N. H., *Ib.*

12. PAYMENT TO FORMER AGENT WHO HAS BEEN REMOVED.—There was printed on the back of the policy, "No receipt valid unless under the seal of the company." The insured had been accustomed to send his premiums to the agent and have the receipts sent in return. The company revoked the agent's authority and refused to furnish him renewal receipts. The insured, ignorant of the fact, forwarded the money to the former agent as usual, and the policy was cancelled for non-payment of premium. *Held*, that the company was at fault in failing to notify the insured not to transmit to the agent when it had knowledge by the previous course of dealing that such had been the practice, and that the insured was entitled to recover the premiums paid, with interest. *Braswell v. Am. Life Ins. Co.*, S. C. N. C., *Ib.*

13. RECEIPT OF PREMIUM BY DAUGHTER OF GENERAL AGENT.—DISCONTINUED AGENCY.—NOTICE, ETC.—The premium was forwarded by insured as usual, by a postal money order to the general agent, within the required time. The agent was absent from home, but his daughter, acting under his instructions, wrote to the insured that her father would send the receipt when he returned. The agent forwarded the money to the company on his return, but it was then past due, and the company demanded a certificate of continued health, which the insured was unable to furnish. The general agency had been previously terminated by the company, and a notice had been sent to the insured, which had been seen in his possession, stating that the premium would become due, and directing him to forward it direct to the home office, but making no reference to the discontinuance of the agency. *Held*, that the company was bound. *McNeilly v. Cont. Life Ins. Co.*, Ct. App. N. Y., *Ib.*

14. PRESUMPTION OF DEATH FROM ABSENCE.—In suit brought about

the year 1871, on a policy of life insurance, wherein the company put in issue the death of the assured and set up the forfeiture of his policy by failure to pay a premium note which had matured June 8, 1861, it appeared in evidence that the assured was unmarried and without a fixed place of abode; that he disappeared about March 1, 1861, from his boarding place at New York, with the declared intention of going to Brooklyn, and did not return; that he left behind clothes and a valise of no great value; that prior to his disappearance, he had been in the habit of writing to his friends and relatives, but was not heard of afterward; that he had lived for years in different states of the South, and had announced his intention of going thither to take up arms in her defence, and expressed, on the other hand, no design of making his residence in New York. *Held*, that under such state of facts, although the assured had been unheard of for more than seven years, the proof was insufficient to raise a presumption of the death of the assured prior to the maturity of the note, and the company could not be held. *Hancock v. Am. Life Ins. Co.*, S. C. Mo., Cent. L. J., September 15, 1876.

See ADMIRALTY, 5.

#### INTOXICATING LIQUORS.

**ACTION FOR SALE OF INTOXICATING LIQUORS. — VENDOR'S LIABILITY. — JOINT ACTION DOES NOT LIE. — CASE STATED. —** Where the defendant sells ale, wine, or beer to one who was already intoxicated or in the habit of becoming intoxicated, he is liable for all damages caused to him by such sale, the same as for injuries sustained from drunkenness produced by any other kind of intoxicating liquors. A joint action does not lie for injuries sustained. Each party must be liable for the injury which he occasioned, and a settlement with one party does not bar the action against another. In an action for damages for selling liquors to a husband the court instructed the jury as follows: "The defendant denies the alleged sales and also insists for a part of the time the plaintiff herself authorized the sale of liquors to her husband. If plaintiff did direct the defendant to sell her husband what he wanted, and the defendant in good faith supposed that such request was made of her own free will, there is no liability for any sales made under these circumstances. But if you find from the evidence that the defendant knew her husband was an habitual drunkard, and knew the wife only requested the sales to be made under the restraint of her husband to keep peace with him, then the defendant is not excused if he did sell the husband and make him drunk." *Held*, correct. *Jewett v. Wanshura*, S. C. Iowa, West. Jur., September, 1876.

#### JURISDICTION.

See BANKRUPTCY, 2; EQUITY, 2.

#### LIEN.

**LIEN ON AFTER-ACQUIRED PROPERTY. —** Whenever parties by their contract intend to create lien or charge either upon real or personal property, whether owned by the assignor or contractor or not, or if personal

property, whether it is then in being, or not, the contract attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto. *Barnard v. N. & W. R. R. Co.*, C. C. U. S. Mass., Cent. L. J., September 22, 1876.

#### LIMITATIONS.

NEW PROMISE DEFINED AND DISTINGUISHED. — To take a case out of the statute of limitations there must be an acknowledgment of the debt as an existing obligation consistent with a new promise to pay it, or an express promise to do so. To be consistent with a promise to pay the debt, the acknowledgment must be such as indicates an intention to pay the debt existing at the time of the acknowledgment. The time of payment need not be immediate, but the intent to pay must be present. In the present case the defendant Houser said: "Why don't you sue the assignees of Hershman, and get the *pro rata*, then he would pay the balance." To the other witness he said: "Now hold on; that there was no use of making expense; that as soon as he knew what amount was wanting after the assignees of Hershman would pay the *pro rata* or dividend, he would pay the balance." *Seuseman v. Hershman*, S. C. Pa., Leg. Int., September 1, 1876.

#### MOB.

See RAILROAD.

#### MORTGAGE.

See BANKRUPTCY, 6; INSURANCE, 5.

#### MUNICIPAL CORPORATION.

LIABILITY OF COUNTY FOR INJURIES CAUSED BY MISCONDUCT OF ITS SERVANTS. — The rule that counties, being political sub-divisions of the state, are not liable for the laches of misconduct of their servants, has no application to a neglect of those obligations incurred by counties when special duties are imposed on them. Thus, where the county of St. Louis made a contract for laying water-pipe to the County Insane Asylum, the work being done under the supervision of the county engineer, and while a trench was being dug in the grounds of the asylum, it caved in and killed one of the workmen; it was *held* that the duty in which the county was engaged was not one imposed by general law upon all counties, but a self-imposed one; that *quoad hoc* the county was a private corporation, engaged in a private enterprise (more especially as the work was being done on its own property), and governed by the same rules as to its liability. In such case it is immaterial whether the performance of the work is voluntarily assumed in the first instance, or is a special duty, imposed by the legislature, and assented to by the county. And municipal and *quasi* corporations are subject to the same doctrine of liability. *Harrison v. Co. of St. Louis*, S. C. Mo., Cent. L. J., September 15, 1876.

#### NEGLIGENCE.

See ADMIRALTY, 1; RAILROAD; SLEEPING CAR COMPANY.

## POWER OF ATTORNEY.

See BANKRUPTCY, 6.

## PRINCIPAL AND SURETY.

DISCHARGE OF SURETY BY EXTENSION OF TIME. — The maker of a note, about the time of its maturity, paid the holder \$75 as interest for six months, and \$37.50 for an extension of the time of payment for the same period, and thereupon the holder of the note gave the maker a receipt for the interest paid, in which it was stated that the time of payment was extended six months. The sureties on the note had no knowledge of this transaction at the time and did not assent to it. *Held*, (1) That this was a valid contract for the extension of time, founded upon a sufficient consideration, and it having been made without the assent of the sureties, they were discharged; (2) That the payment in advance of either legal or usurious interest is a sufficient consideration to sustain such a contract. *Danforth v. Semple*, S. C. Ill., Cent. L. J., September 29, 1876.

See CO-SURETY.

## PUBLIC SCHOOLS.

RIGHT OF DIRECTORS TO PRESCRIBE RULES. — PARENTS CANNOT KEEP CHILDREN FROM SCHOOL TO ATTEND RELIGIOUS WORSHIP DURING SCHOOL HOURS. — The complainants were members of the Catholic Church in the village of Brattleborough, and it appeared on June 4, 1875, the priest of the said church, acting in behalf of the complainants, sent to the respondents, who were the prudential committee of that school district, a request that the Catholic children might be excused from attendance at school on "all holy days," and especially on that day, being holy *Corpus Christi* day. To this note the committee replied that the request could not be granted, as it would involve closing some of the schools and greatly interrupting others. It further appeared that about sixty Catholic children, by direction and command of their parents, were kept from school to attend religious services on said 4th of June, being, as stated in the bill, "holy *Corpus Christi* day." A few of them applied for admission to the schools in the afternoon of that day, and all, or nearly all, so applied the next morning, when they were told by the committee that, as they had absented themselves without permission, and in violation of the rules of the school, which they well understood, they could not return without an assurance from their parents, or their priest, that in future they would comply with the rules of the schools, the committee assuring said children, and many of their parents, and also the priest, that if said schools would not again be interrupted in like manner they would gladly admit said children to them; that said priest and parents refused to comply with such proposal, and claimed that on all days which they regard as holy they may, as matter of right, take their children from the schools without any regard to the rules thereof. Upon these facts the bill prayed an injunction, which was refused and the bill dismissed. *Febriter v. Tyler*, S. C. Vt., Am. Law Reg., October, 1876.

## RAILROAD.

**LIABILITY FOR DELAY IN TRANSPORTATION. — MOB. —** On the 10th of December, 1870, plaintiff shipped by defendant's freight line a quantity of cheese from Chicago to New York. The cheese was delivered to the consignees at New York, on the 28th of December, eighteen days after the shipment. The proofs tended to show that the usual period of such transit, at that time, did not exceed twelve days; that the weather from the 10th to the 23d was not severely cold, but that severe cold occurred between the 23d and 28th, and that the cheese when delivered in New York was frozen, and thereby damaged to the amount of \$1,100.55, and for this amount judgment was entered in favor of plaintiff from which the railway company appeal. As an excuse for the delay beyond the usual period, the defendant, at the trial below, sought to prove that the sole cause was the obstruction of the passage of trains resulting from the irresistible violence of a large number of lawless men, acting in combination with brakemen, who up to that time had been employed by the railway company; that the brakemen refused to work, and were discharged, and other brakemen promptly employed; but the moving of trains was prevented by the threats and violence of a mob. This evidence was objected to by the plaintiff, and excluded by the court. *Held*, error; that the evidence was competent. *P. Ft. W. & C. R. R. Co. v. Hazen*, S. C., Ill., Chicago, L. N., October 7, 1876.

See SLEEPING CAR COMPANY.

## SLEEPING-CAR COMPANY.

**A SLEEPING CAR COMPANY, ALTHOUGH NOT RESPONSIBLE AS A COMMON CARRIER OR AN INNKEEPER, MAY BE HELD FOR NEGLIGENCE. —** It is bound, however, not only to furnish its guests a berth, but to keep a watch during the night, exclude unauthorized persons from the car, and take reasonable care to prevent thefts. In case of loss occasioned by negligence in this regard, the company is liable for such articles as a passenger usually carries about his person, and such sum of money as may be reasonably necessary for his travelling expenses. *Blum v. So. Pullman Palace Car Co.*, C. C. U. S. W. D. Tenn., Cent. L. J., September 15, 1876.

## SUBROGATION.

See INSURANCE, 5.

## SUBSCRIPTION.

See CORPORATION, 3.

## TAXATION.

See CONSTITUTIONAL LAW.

## WILL.

**CONSTRUCTION OF. — DEVISE OF FEE AND REDUCTION TO LIFE ESTATE. —** A will contained the following: —

"Item. I give and bequeath unto my son, John Staudt, and to his heirs, all my large farm where I now live, situate in Bern Township, Berks County, adjoining lands of John Hehn, heirs of Jacob Epler, George Aulenbach, Abraham Koenig and John Koenig, Daniel Aulenbach, Jacob Leinbach, and said Abraham and John Koenig and the river Schuylkill, and John Albert, Abraham Reeser and George Body, containing three hundred acres, more or less, together with all the buildings and improvements, and grain seeded out and grass, and hay and straw and manure, and all timber and posts and rails, together with all the farming stock and the utensils belonging to the farm, unto the said John Staudt, and to his heirs."

"Item. I herewith make known and declare it as my will that none of my aforesaid children shall have a right to sell or assign their land or property to them bequeathed as aforesaid, neither shall they have a right to incumber it with debts or liens, but the lands shall remain free for their children or heirs, and they, my said children, shall have the use, income, and profits of the said land and farms, during their lifetime."

"Item. Whereas, I have ordained in this my will that none of my children shall have a right to sell or incumber, nor involve any of the real estate to them bequeathed, but I do hereby give either of my aforesaid children power, authority, and the right to make a will and testament to take effect after their decease, so that either of them, to wit: John, Catharine, Sarah, Polly, and Harriet may and shall have privilege to dispose of their several legacies by will as aforesaid, but not otherwise." Per CURIAM: The principal item in this will which devises to John Staudt a farm in Bern Township, certainly would give to him a fee simple. But the intention of a testator, when discovered by an examination of all parts of his will, must govern. Therefore, when we come to the item defining the power of his children over the estate given to them, we discover plainly that he intended to confer a life estate only, and not merely to restrict their power over a precedently conferred fee-simple. The power to devise given in the last item is entirely consistent with the gift of a life estate; indeed would be unnecessary, had the testator intended John to have a fee-simple. *Urich v. Merkel*, S. C. Pa., Leg. Int., October 6, 1876.

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#### TRADE-MARK.

FALSE REPRESENTATIONS AS TO ORIGIN OF OWNERSHIP. — Few cases contain a more complete and instructive commentary upon a branch of law than the recently reported case of the *Singer Manufacturing Company v. Wilson*, 34 L. T. Rep. (N. S.) 858. The indicated law illustrated by this case is that branch whose greatest development has been due to the spread of commercial enterprise, we mean the law of trade-marks. Obviously the very existence of this law connotes the growth of a commerce in recognized wares and merchandise. The plaintiff in this action is a well known American company which has acquired a name for its sewing-machines. These machines were generally known as "Singer" machines, and the company was described in advertisements, upon which



large sums of money had been spent, as the maker of those machines. The plaintiff company, however, was not the only maker of such machines. The defendant was in the same trade. He also manufactured sewing-machines. In his advertisements and price lists he described them as Singer machines of his own manufacture, but he made no use of the word Singer upon his instruments. The machines of both parties bore trade-marks which in no way resembled one another, nor could any confusion arise in the mind of an intending purchaser upon this head. Under these circumstances the Singer Company prayed that the defendant might be restrained from advertising or otherwise using the name of "Singer" in connection with any sewing-machines manufactured by him. The master of the rolls dismissed the bill with costs, and the court of appeal has affirmed his decision. The judgment of the master of the rolls is in itself a masterly summary of the law of trade-marks. Starting from the proposition that a manufacturer shall not sell his goods under a false representation that they are made by a rival manufacturer, and having pointed out that the difficulty has always been to determine what amounts to such false representation, his lordship went on to an analysis of the cases which came before the court. These cases may be ranged into two classes: in the one the manufactured goods are "distinguished by some description or device in some way or other affixed to the article sold;" in the other the cases are always cases of fraud. It is obvious that in the former case the trade-mark may or may not be affixed to the goods themselves, according to their nature. Hence the trade-mark or description will be affixed either to the goods or to something else; as to the case which contains them, *e. g.*, the bottle, box, to the string with which they are tied, or the cork in a bottle. "As to this class," said the master of the rolls, "it is quite immaterial that the maker of the goods to which what I will call, for the sake of shortness, the trade-mark, is affixed, did not know that it was a trade-mark, and had not the slightest intention of defrauding anybody. . . . And the reason is obvious, because the goods pass from hand to hand, and though he may act with the utmost *bona fides*, yet the ultimate purchasers might believe that they were the real goods of, that is to say, that they were manufactured by, the person entitled to the original trade-mark." Consequently, in any cases of this class, a plaintiff has merely to show that the trade-mark has been taken. This consideration induced the master of the rolls to examine what is meant by saying that a trade-mark has been taken. Apparently, the only general rule which can be laid down on the subject is, that it is quite sufficient if it is proved that a substantial material, or an essential portion of the trade-mark has been copied, for all these expressions mean the same thing. It is, however, no easy matter to lay down in general terms what is the essential part of a trade-mark. If a very original mark is adopted, or if any distinctive mark is used, such as that referred to in the judgment, "a fanciful animal, such as we are familiar with in heraldry, or one which no human being had thought of before," it would be no hard task to decide whether there had been an infringement. In the other cases the material question is one of fraud, as if the defendant palmed off goods by means of misrepresentation. Here of course it is of prime importance that there should be misrepresentation proved. In the present case the

defendant used a different trade-mark, showing that the sewing-machines in question were manufactured by him, and not by any other maker; again there was no doubt that this information was published to the world openly. The conclusion to which the master of the rolls came was that the defendant's case was not unlike that of a wine merchant who sends out a circular stating that he manufactures champagne which is named after the celebrated brands, but merely puts his own name on the bottles, so that there could be no mistaking that he was selling wines manufactured by himself. In the court above, the argument was of a thorough kind, and reliance was placed upon a decision of a Scotch court, which was on all fours with the present case. That case, so far at least as the courts in England are concerned, was overruled by the court of appeal. — *London Law Times*.

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#### NOTES OF NEW BOOKS.

OTTO'S REPORTS of the Decisions of the Supreme Court of the United States. The first volume of the new reporter has been issued from the press of Messrs. Little, Brown & Co. The price announced is \$5.

The same Publishers announce the following for early publication: STORY'S COMMENTARIES ON EQUITY JURISPRUDENCE. Twelfth edition. With Notes. By J. W. Perry; UNITED STATES DIGEST. Table of Cases in First Series; GREENLEAF ON THE LAW OF EVIDENCE. Vols. II. and III.; BISHOP'S CRIMINAL LAW. Sixth edition; HOLMES'S REPORTS. Vol. I. Reports of Cases argued and determined in the Circuit Court of the United States for the First Circuit. By Jabez S. Holmes; BIGELOW'S TREATISE ON THE LAW OF FRAUD, both as a Ground of Action and as a Defence in Law and Equity; STEPHEN'S DIGEST OF THE LAW OF EVIDENCE. Edited, with Notes and References to American Cases, by John W. May.

Messrs. BAKER, VOORHIS & Co. will publish at an early day a new edition of *Burrill on Voluntary Assignments*; *Thomas on Mortgages*, — a treatise on the law as it obtains in New York; and *Waterman's U. S. Criminal Digest*, — a Digest of all American Cases.

MESSRS. GOULD & SON, of Albany, announce that *Tyler on Fixtures*, a treatise of a comprehensive character, is in press.

THE SOUTHERN LAW REVIEW for October, 1876, like the two preceding numbers, is of exceptional value. Judge Dillon contributes a paper upon Municipal Bonds, and Mr. High a paper on the Right of Action against Receivers of other Courts. The other articles are scarcely less interesting.

# THE AMERICAN LAW TIMES.

NEW SERIES. — DECEMBER, 1876. — VOL. III., No. 12.

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## NOTES OF OPINIONS, DECISIONS, AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1876.

*Monday, October 9, 1876.*

PURSUANT to adjournment, the court met at 12 o'clock M. Present: Mr. Chief Justice Waite, Mr. Justice Clifford, Mr. Justice Swayne, Mr. Justice Miller, Mr. Justice Field, Mr. Justice Strong, and Mr. Justice Hunt.

Mr. Chief Justice Waite announced to the bar that the court would commence the call of the docket to-morrow, under the twenty-sixth rule.

Adjourned until to-morrow at 12 o'clock.

*Monday, October 16, 1876.*

No. 3. *Wm. H. Gaines et al., plaintiffs in error, v. J. C. Hale and H. M. Rector.* In error to the Supreme Court of the State of Arkansas. Mr. Justice Bradley very briefly delivered the opinion of the court, affirming the judgment of the said supreme court, with costs, on the authority of the Hot Springs case, decided at the last term.

No. 674. *S. L. Hoge, comptroller, &c., appellant, v. The Richmond & Danville Railroad Co.* Mr. Chief Justice Waite delivered the opinion of the court, denying the motion to advance this cause. In this case the court announces that it will not give preference to cases in which the execution of the revenue laws of a state is enjoined, unless it sufficiently appears that the operations of the government of the state will be embarrassed by delay.

*Monday, October 23, 1876.*

No. 34. *J. W. Fuller et al., plaintiffs in error, v. H. B. Clafin & Co.* In error to the District Court of the United States for the Western District of Arkansas. Mr. Justice Hunt delivered the opinion of the court, reversing the judgment of the said district court, with costs, remanding the cause for further proceedings in conformity with law and justice. The cause involved no points of interest.

No. 8, original. *R. S. Parks, petitioner.* Mr. Justice Bradley delivered the opinion of the court, denying the petition for a writ of *habeas corpus*. In this cause it is decided that where an inferior court has jurisdiction of the cause and the person in a criminal suit, and no writ of error lies to the supreme court, the latter will not review the legality of the proceedings on *habeas corpus*. It is only where the proceedings below are entirely void, either for want of jurisdiction, or other cause, that such relief will be given. Whether a matter for which a defendant is indicted in the district court is or is not a crime by the laws of the United States, is a question which that court must decide, and is within its jurisdiction. This court will not review its decision by *habeas corpus*.

No. 28. *The New York Life Insurance Co., appellant, v. William C. Statham et al.*; No. 29. *The New York Life Insurance Co., plaintiff in error, v. Charlotte Seyms*; No. 188. *The Manhattan Life Insurance Co., plaintiff in error, v. R. S. Buck, executor, &c.* Appeal and in error to the Circuit Court of the United States for the Southern District of Mis-

missippi. Mr. Justice Bradley delivered the opinion of the court, reversing the decree and judgments of the said circuit court, and remanding the causes for further proceedings in conformity with law and justice, each party to pay their own costs in this court. Dissenting, Mr. Justice Clifford and Mr. Justice Hunt. The opinions in these causes appear in the present issue of the *American Law Times Reports*.

No. 7, original. *The State of South Carolina, complainant, v. The State of Georgia et al.* Bill in chancery. Mr. Justice Strong delivered the opinion of the court, dissolving the injunction and dismissing the bill, with costs. The following are the points decided:—

The compact between South Carolina and Georgia, made in 1787, by which it was agreed that the boundary between the two states should be the northern branch or stream of the Savannah River, and that the navigation of the river along a specified channel should forever be equally free to the citizens of both states, and exempt from hindrance, interruption, or molestation, attempted to be enforced by one state on the citizens of another, has no effect upon the subsequent constitutional provision that Congress shall have power to regulate commerce with foreign nations and among the several states.

Congress has the same power over the Savannah River that it has over the other navigable waters of the United States.

The right to regulate commerce includes the right to regulate navigation, and hence to regulate and improve navigable rivers and ports on such rivers.

Congress has power to close one of several channels in a navigable stream, if, in its judgment, thereby the navigation of the river will be improved. It may declare that an actual obstruction is not, in the view of the law, an illegal one.

An appropriation for the improvement of a harbor on a navigable river, "to be expended under the direction of the secretary of war," confers upon that officer the discretion to determine the mode of improvement, and authorizes his diversion of the water from one channel into another, if in his judgment such is the best mode.

Such a diversion is not giving preference to the ports of one state over those of another.

*Quere*, Whether a state suing for the prevention of a nuisance in a navigable river, which is one of its boundaries, must not aver and show that she sustains some special and peculiar injury thereby, such as would enable a private person to maintain a similar action.

No. 31. *Harvey Terry, appellant, v. The Merchants' & Planters' Bank.* Appeal from the Circuit Court of the United States for the Southern District of Georgia. Mr. Justice Miller delivered the opinion of the court, affirming the decree of the said circuit court, with costs. In this cause it is held: 1. That where an appellant obtains an order of severance in the court below and does not make parties to his appeal some who were parties below and who are interested in maintaining the decree, he cannot ask its reversal here on any matter which will injuriously affect their interests. 2. That when an appellant seeks to reverse a decree because too large an allowance was made to appellees out of a fund in which he and they were both interested, he will not be permitted to do so when he has received allowances of the same kind, and has otherwise waived his right to make the specific objection which he raises for the first time here.

No. 6. *E. R. Smith, executor, &c., et al., plaintiffs in error, v. George W. Chapman, executor, &c.* In error to the Circuit Court of the United States for the District of Minnesota. Mr. Justice Clifford delivered the opinion of the court, reversing the judgment of the said circuit court, with costs, and remanding the cause for further proceedings in conformity with law and justice. The only point decided is that a judgment against an administrator should be *de bonis testatoris* and not *de bonis propriis*.

No. 30. *Harvey Terry, appellant, v. The Bank of Commerce.* Appeal from the Circuit Court of the United States for the Southern District of Georgia. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the appeal in this cause for the want of jurisdiction, the amount involved being less than \$2,000.

No. 60. *Arthur Hughes et al., plaintiffs in error, v. The Milwaukee National Bank of Wisconsin.* In error to the Circuit Court of the United States for the Southern District of New York. Mr. Chief Justice Waite announced the decision of the court, affirming the judgment of the said circuit court in this cause, with costs, on the authority of *Davis v. National Exchange Bank*, 91 U. S. Reports, 618.

Monday, October 30, 1876.

No. 50. *Thomas Beaver, plaintiff in error, v. S. Staats Taylor et al.* In error to the Circuit Court of the United States for the Southern District of Illinois. Mr. Justice

Hunt very briefly delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. The case involved no points of moment.

No. 35. *The President, &c., Chemung Canal Bank, plaintiffs in error, v. Goodwin Lowrey, &c.* In error to the Circuit Court of the United States for the Western District of Wisconsin. Mr. Justice Bradley delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. Dissenting, Mr. Justice Strong. It is decided in this cause: 1. That under the laws of Wisconsin the statute of limitations may be pleaded by demurrer. 2. That a statute which may be expressed shortly thus: "When the defendant is out of the state the statute of limitations shall not run against the plaintiff if the latter resides in the state, but shall if he resides out of the state," is not unconstitutional. Other points involved were not considered.

No. 51. *Mary Ryan et al., plaintiffs in error, v. H. S. Carter et al.* In error to the Circuit Court of the United States for the Eastern District of Missouri. Mr. Justice Davis delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. In this cause it is held that the word "affect," as used in the proviso of the act of June 13, 1812, concerning titles to lands ceded by France, means "act injuriously upon," and that *Strother v. Lucas* (12 Peters, 410) is not an authority to the contrary.

No. 42. *F. O. French, plaintiff in error, v. R. W. Ryan et al.* In error to the Circuit Court of the United States for the Eastern District of Missouri. Mr. Justice Miller delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. (The opinion in this cause being inaccessible at the time of going to press, the points decided will appear in a subsequent issue. — EDITOR.)

No. 7. *Peyton Grymes, appellant, v. Dallas Sanders, administrator, &c.* Appeal from the Circuit Court of the United States for the Eastern District of Virginia. Mr. Justice Swayne delivered the opinion of the court reversing the decree of the said circuit court, with costs, and remanding the cause with direction to dismiss the bill. This cause involved a question of mistake as to matter of fact, and the court announces when equity will grant relief. It is said that a mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved.

Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value. The facts in the case presented are held to be such as not to bring it within these rules.

No. 52. *The West Wisconsin Railway Co., plaintiff in error, v. The Board of Supervisors of Trempealeau County.* In error to the Supreme Court of the State of Wisconsin. Mr. Justice Swayne delivered the opinion of the court, affirming the judgment of the said supreme court, with costs. Mr. Justice Davis did not sit in this cause, and took no part in the decision. (The opinion in this cause not being accessible, the points decided will be reported in a subsequent issue. — EDITOR.)

No. 41. *Fredk. Birdsall et al., plaintiffs in error, v. C. C. Conlidge.* In error to the Circuit Court of the United States for the District of Nevada. Mr. Justice Clifford delivered the opinion of the court, reversing the judgment of the said circuit court, with costs, and remanding the cause with directions to award a *venire facias de novo*. This was a patent case and the questions presented had relation to the measure of damages. The facts showed a use of certain patented improvements for a period of six weeks. The court below charged the jury that, there being an established royalty, they must find the full amount for such use. This instruction is here held to be erroneous as not defining the actual damage within the established rules as applied to all the facts.

No. 777. *Paxson Kitchen, appellant, v. E. D. Randolph.* Mr. Chief Justice Waite delivered the opinion of the court, granting the motion to vacate the supersedeas in this cause. It is decided in this cause that, under the law as it now stands, the service of a writ of error, or the perfection of an appeal within sixty days, Sundays exclusive, after the rendering of the judgment or the passing of the decree complained of, is an indispensable prerequisite to a supersedeas, and that it is not within the power of a justice

or judge of the appellate court to grant a stay of process on the judgment or decree if this has not been done.

No. 36. *John L. Hurst, plaintiff in error, v. The Western & Atlantic Railroad Co.* In error to the Circuit Court of the United States for the Eastern District of Tennessee. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. This cause had relation to a question of removal under the Act of March 2, 1867. The court said: The Act of March 2, 1867, provided, in substance, that where a suit was pending in a state court, between a citizen of the state in which the suit was brought and a citizen of another state, and the matter in dispute exceeded the sum of five hundred dollars, *such citizen of another state*, whether plaintiff or defendant, if he made and filed in such state court an affidavit stating "that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court," might have the cause removed to the circuit court of the United States. Here the suit was brought in a court of the State of Tennessee, by a citizen of that state, against a citizen of the State of Georgia. Under the statute the party who was a citizen of Tennessee could not have the cause removed to the circuit court, because he was a citizen of the state in which the suit was brought and not of "another state," but the citizen of Georgia could. In this case the removal was made upon the application of the party who was a citizen of Tennessee, and consequently, the circuit court properly refused to entertain jurisdiction.

No. 67. *Edward C. Carrington, plaintiff in error, v. Marion Eastwood.* In error to the Supreme Court of the District of Columbia. Mr. Chief Justice Waite announced the decision of the court, affirming the judgment of the said supreme court, with costs and interest.

The chief justice made the following announcement to the bar: "We shall meet on Monday of next week as usual, to read opinions and hear motions. If counsel from abroad, coming here in the expectation that their causes would be reached before that time in the regular call of the docket, shall then be present, and wish to be heard, we will continue in session to give them an opportunity for that purpose. As soon as all such cases are submitted the court will be adjourned until Monday, November 13, after which time the rules requiring the argument of causes in their order upon the docket will be rigidly enforced."

*Monday, November 6, 1876.*

Mr. A. G. Riddle moved for the admission of Mrs. Belva A. Lockwood as an attorney and counsellor of this court. Motion denied. Upon the presentation of this application, the chief justice said that notice of this motion having been previously brought to his attention, he had been instructed by the court to announce the following decision upon it: By the uniform practice of the court from its organization to the present time, and by the fair constructions of its rules, none but men are admitted to practise before it as attorneys and counsellors. This is in accordance with immemorial usage in England, and the law and practice in all the states until within a recent period, and the court does not feel called upon to make a change until such change is required by statute or a more extended practice in the highest courts of the states.

No. 72. *Justus F. Dresser, plaintiff in error, v. The Missouri & Iowa Railway Construction Co.* In error to the Circuit Court of the United States for the District of Iowa. Mr. Justice Hunt delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. This was an action on a promissory note, to which the defence was that it was obtained by fraud. The plaintiff in error had made a payment upon the note before he had notice of the fraud, but, becoming aware of the fraud subsequently, as alleged, he made full payment thereon. The court gave him judgment only for the portion paid before notice of the fraud, and that judgment is here affirmed, the decision being that the portion of an unperformed contract which is completed after notice of a fraud is not within the principle which protects a *bonâ fide* purchaser.

No. 62. *Stephen and Thompson Bird, executors, &c., plaintiffs in error, v. The Louisiana State Bank.* In error in the Circuit Court of the United States for the District of Louisiana. Mr. Justice Bradley delivered the opinion of the court, reversing the judgment of the said circuit court, with costs, and remanding the cause with directions to award a *venire facias de novo*. In this cause it appeared from the findings of fact that R. A. S. made a promissory note at New Orleans, on the 28th of January, 1859, payable to the order of H. D., at twelve months after date, with interest, at the Citizens' Bank, New Orleans, and said note was indorsed by said H. D. A. B., of Manchac, Louisiana, as the agent of J. B., of St. Louis, Missouri (the testator of the plaintiffs), before the

maturity of the note, indorsed it and deposited it in the branch of the Louisiana State Bank, at Baton Rouge, for collection. W. S. P., the cashier of the said branch bank, indorsed the note as cashier before its maturity and transmitted it for collection to the defendant, the mother bank at New Orleans. When it became due the defendant placed it in the hands of the notary whom it usually employed in its own business, for demand of payment and protest; and said notary duly made demand, and protested the note for non-payment, and mailed notices for the indorsers to said W. S. P., cashier of the branch bank at Baton Rouge. H. D., the indorser, on whom reliance was principally placed, resided when the note was made and indorsed on a plantation at New River, in the parish of Ascension, which adjoins that of Baton Rouge; but he died two days afterwards, and executors of his will were immediately qualified. No notice of protest was served on them, and for this cause, in an action brought against them by the plaintiffs, they were held not liable. No suit was ever brought against the maker of the note, he being wholly without credit as to the payment of any debt when it became payable, and as to him the note is now prescribed. Neither the notary nor any of the officers of the bank or branch knew of said H. D.'s death when the note was protested, nor did it appear that it was known to the testator of the plaintiffs. The suit was brought to recover the amount of the note from the defendant by reason of its alleged negligence in not giving notice to the executors of the indorser, H. D., whereby the liability of his estate was lost. The court having found these facts, and some others not material, gave judgment for the defendant. It is here held that the judgment was erroneous, that the branch bank, and consequently the mother bank, was liable for the neglect to give notice, and that plaintiffs had not by their laches lost their right to sue and recover.

No. 54. *The United States, plaintiffs in error, v. Leo L. Ferrary et al.* In error to the Circuit Court of the United States for the Eastern District of Tennessee. Mr. Justice Strong delivered the opinion of the court, reversing the judgment of the said circuit court, and remanding the cause, with directions to award a *venire facias de novo*. In this case a distiller, the defendant in error, refused to pay certain taxes on the products of his distillery, on the ground that a copy of a second survey had not been served upon him, and the court below sustained his position. It is here held that there was no second survey, all that was done being the reformation of the estimate resting on the first measurements, and that the court below erred in confounding the survey required by the tenth section of the act with the estimate and determination of producing capacity calculated from the survey.

No. 26. *Thomas Sherlock et al., plaintiffs in error, v. Chas. Alling, administrator, &c.* In error to the Supreme Court of the State of Indiana. Mr. Justice Field delivered the opinion of the court, affirming the judgment of the said supreme court, with costs. (The opinion in this cause being inaccessible, the points decided will be reported hereafter. — EDITOR.)

No. 39. *The Board of Commissioners of Tippecanoe County, plaintiff in error, v. Martin Lucas, treasurer, &c.* In error to the Supreme Court of the State of Indiana. Mr. Justice Field delivered the opinion of the court, affirming the judgment of the said supreme court, with costs. In this case it is held that the states have power to direct the delivery of certificates of stock given to counties in return for subscriptions in aid of local railroads to the tax-payers personally for their private benefit, and thus to divest the various counties of title to the stock originally issued to them. The commissioners in this case resisted the law, which directed the county treasurer to issue such certificates to those who had, as appeared by the record of this office, paid the taxes which aided the roads, and the state court affirmed the right of the legislature to transfer the public title to private persons as provided in the act. This court affirms the judgment, saying that there can be doubt of the power of the state to direct a restitution to the tax-payers of a county, or other municipal corporation, of property exacted from them by taxation into whatever form the property may be changed, so long as it remains in the possession of the municipality.

No. 37. *The Home Insurance Company of New York, plaintiff in error, v. The City Council of Augusta, Ga.* In error to the Supreme Court of the State of Georgia. Mr. Justice Swayne delivered the opinion of the court, affirming the judgment of the said supreme court in this cause, with costs. In this case the court sustains a tax of \$250, which was imposed upon the plaintiff in error under an ordinance imposing the same tax on all fire, marine, and accidental insurance companies located or doing business within the limits of the city, there being no discrimination in the matter against non-resident companies, the authority therefor being found in the police power of the state.

No. 71. *The County of Calhoun et al., appellants, v. The American Emigrant Company.* Appeal from the Circuit Court of the United States for the District of Iowa. Mr. Justice Clifford delivered the opinion of the court, affirming the decree of the said circuit court in this cause, with costs. In this case the court sustains a decree below enjoining the county from taxing lands sold by the county to the company, on the ground that the property was exempt by a special contract between the municipality and the company.

## DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

### ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & CO.  
 Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.  
 Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & CO.  
 Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.  
 Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.  
 Daily Reg. — *Daily Register*, New York, 303 Broadway.  
 Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.  
 Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.  
 La. L. J. — *Louisiana Law Journal*, New Orleans, La.  
 Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.  
 Leg. Gaz. — *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.  
 Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.  
 Mo. West. Jur. — *Monthly Western Jurist*, Bloomington, Ill., T. F. TIPTON.  
 N. B. R. — *National Bankruptcy Register*, New York, CAMPBELL & CO.  
 Pac. Law. Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.  
 Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.  
 W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.  
 West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & CO.

### ADMIRALTY.

1. SALVAGE. — RAISING A FLOATING DOCK is not a salvage service. *Salvor Wreck. Co. v. Sec. Dock Co.*, C. C. U. S. E. D. Mo., Cent. L. J., October 6, 1876.

2. NAVIGATING RAFT OF LOGS. — A LIBEL IN REM cannot be maintained for navigating a raft of logs. *In re Raft of Logs*, D. C. U. S. W. D. Tenn., Chicago L. N., October 14, 1876.

### ASSESSMENT.

See COVENANT; INTERNAL REVENUE.

### ATTORNEY.

See BANKRUPTCY, 3.

### BANKRUPTCY.

1. FRAUDULENT PREFERENCE. — A CREDITOR HAVING A CLAIM AGAINST HIS BROTHER which would absorb all the debtor's assets brought action thereon. The brother thereafter continued to do business as usual,



and to purchase goods on credit, and after the time to enter judgment in the action had elapsed, made statements to the agent of another creditor that led him to believe that no change had occurred in the debtor's circumstances. Judgment was not entered and execution issued until ten days after such steps might have been taken. *Held*, that there was sufficient evidence that a preference was intended, and that the debtor and creditor coöperated to secure that result, and the lien of the judgment and execution was not valid. *In re Baker*, D. C. U. S. N. D. N. Y., Albany L. J., October 28, 1876.

2. FAILURE TO NOTIFY A CREDITOR, which occurs through no fault of the bankrupt, will not avoid a discharge. *Thornton v. Hogan*, S. C. Mo., Cent. L. J., November 10, 1876.

3. DISMISSAL OF SUIT BY ATTORNEY HOLDING ASSIGNMENT. — If an attorney holding an assignment of a policy of insurance, as security for his fees, dismisses a suit thereon, in the name of the bankrupt, and all the parties at the time know of the bankruptcy of the plaintiff, the entry will be stricken out on the motion of the assignee, although the motion is not made until a subsequent term. *Home Ins. Co. v. Hollis*, S. C. Ga., 14 N. B. R. No. 8.

4. COMMENCEMENT OF PROCEEDINGS AGAINST ONE MEMBER OF FIRM. — The commencement of proceedings in bankruptcy against one partner within four months after the issuing of an attachment against the firm does not dissolve it. *Mason v. Warthen*, S. C. W. Va., *Ib*.

5. ATTACHMENT. — STAY OF PROCEEDINGS. — Where an attachment was issued more than four months before the commencement of proceedings in bankruptcy, the proceedings for a judgment *in rem* will not be stayed. *Ib*.

6. PRACTICE. — PROOF TO ADMIT CREDITOR TO VOTE FOR ASSIGNEE. — CORPORATION. — As a very general rule, the register should demand the same degree of proof, before admitting a creditor to vote for assignee, as is requisite in a trial at law or a hearing in equity. Exceptional cases, if free from all suspicions, might authorize his deviation from such rule. The managing officers of a corporation, when *bond fide* creditors, have the same rights to vote for assignee as any other claimant. Their debts, however, should be more carefully scrutinized by the register, and if, after such scrutiny, he entertains suspicions of their rectitude, they should be postponed. In making such examination, he should not be called upon to decide upon doubtful proofs; and if the claim is not susceptible of ready and demonstrable explanation, a case of suspicion under the statute should be deemed to exist. *In Re No. Iron Co.*, C. C. U. S. E. D. Mich., *Ib*.

7. THE POWER OF MARSHALLING ASSETS will not be exercised to the material injury or prejudice of the creditor holding both funds. *In re Sant Hoff*, D. C. U. S. E. D. Wisc., *Ib*.

8. A MERE DELAY OR POSTPONING OF PAYMENT is not regarded as a material injury, for the interest on the claim is deemed an adequate compensation to the party for such delay. *Ib*.

9. AN ACTION TO FORECLOSE A MORTGAGE IS NOT A DOUBTFUL REMEDY, and will not unreasonably delay the party, or materially injure or prejudice his rights. Where a third party has assigned his property to a creditor to secure the debt, the creditor is not required to exhaust

such security before he can enforce his remedies against the bankrupt's estate. *Ib.*

10. IF A CREDITOR HAS A MORTGAGE UPON THE BANKRUPT'S HOME-STEAD, he may be required to exhaust that remedy before he can enforce his other remedies against the bankrupt's estate. *Ib.*

11. PRACTICE. — APPEAL. — THE TEN DAYS PRESCRIBED BY GENERAL ORDER 26, within which the declaration on appeal is to be filed in the circuit court, is directory and not mandatory, and if the requisites of sections 4980, 4981, 4982, and 4984 of the Revised Statutes have been complied with, the failure to comply with Rule 26 will not deprive the circuit court of jurisdiction over the appeal. The "appeal" described in General Order 26 is not a transcript of the proceedings in the district court, but is the "statement in writing of the creditor's claims" prescribed by section 4984, Revised Statutes, and it is this statement or declaration, and not the transcript, which should be filed within ten days of the entry of the decree. — *Barron v. Morris*, C. C. U. S. W. D. Tex., *Ib.*

See INSURANCE.

#### CONSTITUTIONAL LAW.

CORPORATION. — USURY. — AN ACT PERMITTING A CORPORATION TO TAKE A PREMIUM ON LOANS made by it, and providing that "said loans shall be made at such rate of interest as may be agreed upon by the parties thereto, *together with such premiums therefor as may be offered by the parties to whom the loans may be made,*" is unconstitutional. *In re Lytle & Co.*, Ct. App. Ky., Am. Law Rec., November, 1876.

#### CORPORATION.

See BANKRUPTCY 6; CONSTITUTIONAL LAW.

#### COVENANT.

COVENANT IN A LEASE TO PAY ALL TAXES DOES NOT INCLUDE ASSESSMENT. — A covenant in a lease whereby the lessee covenants "to pay the taxes of every name and kind that should be assessed on the premises at any time during the said term." *Held*, not to cover an assessment for benefits accruing from street improvements. *Beals v. Providence Rubber Co.*, S. C. R. I., Chicago L. N., October 21, 1876.

#### DIVORCE.

See WILL, 2.

#### INSURANCE.

BANKRUPTCY WHERE POLICY IS MADE VOID IF PROPERTY IS SOLD. — Where a policy of insurance contains a provision that it shall be void if the property insured shall be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, it becomes void upon the bankruptcy of

the insured, and the appointment of an assignee. *Perry v. Lorillard Fire Ins. Co.*, Com. App. N. Y., 14 N. B. R. No. 8.

#### INTERNAL REVENUE.

**TAX UPON DISTILLER.** — GOVERNMENT NOT CONCLUDED BY ASSESSMENT AND PAYMENT. — The United States statute (15 U. S. Stat. at Large, 133) imposes a tax upon a distiller for spirits equal to at least eighty per cent. of the producing capacity of his still. The defendant produced at his still spirits amounting to less than eighty per cent. of its producing capacity, and was assessed for the entire actual production, and paid the amount assessed. *Held*, that the government were not concluded by the assessment and payment, but were entitled to recover the difference between the tax paid and the tax upon eighty per cent. of the producing capacity of the still. *U. S. v. Halloran*, D. C. U. S. S. D. N. Y., Albany L. J., October 21, 1876.

#### JUDGMENT.

See MISFEASANCE.

#### JURISDICTION.

1. **WHERE REAL ESTATE IS NOT WITHIN THE JURISDICTION AND COURT HAS JURISDICTION OF THE PERSON.** — The rule is now well settled that a court of equity will entertain a suit respecting the rights to real estate situate in another state or county, where jurisdiction of the parties has been acquired. When a controversy arises out of a contract, or out of fraud, or involves the consideration of a trust in regard to lands in another state, the jurisdiction of a court of chancery will act upon the conscience of the person if found within the jurisdiction of the forum, and compel him to do what is required of him by justice and equity. *Moore v. Jaeger*, S. C. D. C., W. L. R., October 7, 1876.

2. **IBID.** — WHERE A PARTY HAS EXECUTED A DEED OF TRUST upon real estate to secure an indebtedness to the complainant, and subsequently causes to be purchased for his benefit, in the name of other persons, outstanding titles for the purpose of defending the complainant, equity will decree that he must hold the titles thus acquired upon the uses and trusts declared in the trust deed he had previously executed for the benefit of the complainant. *Id.*

#### LEASE.

See COVENANT.

#### MECHANIC'S LIEN.

**PARAMOUNT TO MORTGAGE.** — A mechanic's lien dates from the commencement of the structure, and is paramount to a mortgage executed after the commencement of the structure, though before the particular work was done or materials furnished for which the lien is claimed. *Neilson v. Iowa East. Railway Co.*, West. Jur., October, 1876.

#### MISFEASANCE.

**MISFEASANCE OF CLERK OF COURT.** — A clerk of court who, in enter-

ing up a judgment, omits to insert the amount of the judgment, by which omission the amount of the same is lost, is liable personally for the amount thus lost by his nonfeasance. *State v. Dodd*, S. C. Ill., Cent. L. J., October 6, 1876.

#### MORTGAGE.

See MECHANIC'S LIEN ; RAILROAD.

#### NATIONAL BANK.

**TAXATION OF SHARES OF, BY STATE.** — By the section of the National Banking Act (Rev. Stats. § 5219) which permits the states to authorize all the shares held in national banks by any person to be included in the valuation of his personal property, and to be assessed at the place where the national bank is located, subject to the restriction "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals," Congress has limited the states to taxation upon the shares in national banks as distinguished from taxation of the banks *eo nomine* upon their property or capital. A state cannot evade the restrictions of the act by requiring the value of the property of the bank to be added to the value of the shares otherwise ascertained, and thus produce an unfavorable discrimination in the taxation of bank shares. *St. Louis National Bank v. Papin*, C. C. U. S. E. D. Mo., Cent. L. J., October 20, 1866.

#### PARTNERSHIP.

See BANKRUPTCY, 4.

#### PLEADING AND PRACTICE.

**CRIMINAL LAW. — DEMURRER. — AN APPEAL** cannot be taken from a decision upon a demurrer in a criminal case in Iowa. *State v. Swearingen*, S. C. Iowa, West. Jur., October, 1876.

See BANKRUPTCY, 2, 6, 7, 8, 9, 10, 11 ; REMOVAL OF CAUSES.

#### RAILROAD.

**MORTGAGE. — FORECLOSURE. — WAGES OF EMPLOYEES.** — Under a bill in equity brought to foreclose a railway mortgage, which contained the usual clause empowering the trustees, on default in the payment of the interest accruing on the bonds, to take possession and operate the road, and collect the earnings for the payment of such interest, if a surplus fund has accrued from the earnings of the road, under the management of receivers appointed by the court, the court has power to appropriate such fund to the payment of arrearages of wages due the officers and employees of the defaulting railway company, especially if it appear that such wages accrued after default in the payment of interest on the bonds secured by the mortgage. *Douglas v. Cline*,<sup>1</sup> Ct. App. Ky., Cent. L. J., October 13, 1876.

#### REMOVAL OF CAUSES.

1. **ALIEN. — RESIDENCE.** — Citizenship and the right to vote are

<sup>1</sup> An able dissenting opinion in this case is published in the *Central Law Journal* for October 20, 1876.

neither identical nor inseparable; and the Constitution of Minnesota, although it authorizes resident unnaturalized foreigners to vote at state elections and hold office, does not make them citizens of the state, and such persons may remove causes to the circuit court of the United States on the ground that they are aliens, although they have resided in the state for many years and voted at elections as authorized by the state Constitution, or held office under the laws of the state. *Lauz v. Randall*, C. C. U. S. Minn., Cent. L. J., October 27, 1876.

2. UNDER ACT OF 1875. — WHEN REMOVAL MAY BE MADE. — WAIVER OF RIGHT TO REMOVE. — A removal cannot be made under the Act of March 3, 1875, of a suit pending in a state court at the time of the passage of that act in which a trial was had after such passage, — though the verdict was set aside and a new trial allowed, and the petition for removal was made at the first term at which the second trial could have been had. The failure to make the motion to remove the cause to the state court, until an entire term had intervened between the filing of such motion and of the transcript from the state court, is not a waiver of the right to make it, nor a submission to the jurisdiction of the United States court, where no other proceedings were had therein than the filing of such transcript and motion. *Young v. Andes Ins. Co.*, C. C. U. S. S. D. Ohio, Cent. L. J., November 10, 1876.

3. REMOVAL BY ONE OF SEVERAL DEFENDANTS. — In a suit by a plaintiff of one state against several defendants of a different state, where the sum in dispute exceeds, exclusive of costs, the sum of five hundred dollars, where the matter in controversy is wholly between them, and which can be fully determined between the plaintiff and the defendants, either of the defendants actually interested in the controversy may remove such suit to the circuit court of the United States. The removal of a suit by one of the defendants, under such circumstances, removes it as to all of the defendants. To accomplish such removal, it is not necessary that all of the defendants should join in the petition for removal. *Stapleton v. Reynolds*, D. C. U. S. S. D. Ohio, Chicago L. N., October 21, 1876.

#### TRUSTS.

See JURISDICTION, 2; WILL, 3.

#### USURY.

See CONSTITUTIONAL LAW.

#### WILL.

1. BEQUEST. — UNCERTAINTY. — Where the testator bequeathed, after the payment of his debts, all his property "to the Roman Catholic orphans of the diocese of La Crosse, State of Wisconsin, and named the bishop of the diocese his executor, giving him power to sell the above property, and use the proceeds for the benefit of the Roman Catholic orphans. Held, that this provision in the will was void for uncertainty. *Heiss v. Murphy*, S. C. Wisc., Cent. L. J., October 6, 1876.

2. A DIVORCE GRANTED TO A HUSBAND DOES NOT *ipso facto* REVOKE A WILL made to the wife before marriage; unless the will provides to

the contrary or is expressly revoked, the divorced wife will be entitled to her legacy upon the death of the husband. *Charlton v. Miller*, S. C. Ohio, Mo. West. Jur., November, 1876.

3. DEVISE TO TRUSTEES WITH POWER TO SELL. — DEATH OF TRUSTEE. — EXECUTION OF POWER. — EQUITY JURISDICTION. — IGNORANCE OF LAW. — A devised lands to four trustees "to sell and dispose of the same at private sale, on such terms as to them shall seem meet;" one of the trustees died, and another removed from the state; a sale of the land to B was negotiated by the other two, with the assent of the one who was absent; B paid the agreed consideration, and it was distributed, in accordance with the terms of the will, among the legatees; the two resident trustees made a conveyance of the lands to B, all of the parties concerned supposing at the time that such a conveyance was a valid execution of the power. The trustees were discharged by the order of the court, and B subsequently, — the bill in this case praying a specific performance of the contract of sale by the heirs at law (who were also legatees under the will), and their grantees; *held*, that if the non-execution of a power by trustees is occasioned by a misapprehension of the law, *ignorance of the law must have been the sole occasion of the mistake*, in order to defeat the interference of a court of equity; and if the case involves other facts which present a case for relief, equity is vigilant to lay hold of them in order to protect rights. *Long v. Soule*, C. C. U. S. W. D. Mich., Chicago L. N., October 21, 1876.







